

**Kinney Drugs, Inc. and Teamsters Local 687, International Brotherhood of Teamsters, AFL-CIO.**  
Cases 3-CA-16740 and 3-RC-9808

July 12, 1994

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND DEVANEY

The issues presented for the National Labor Relations Board's review in this case are whether the judge correctly found that: (1) the Respondent committed violations of Section 8(a)(1) of the Act; (2) this unlawful conduct interfered with employee choice in a Board representation election; (3) the challenges to ballots cast by certain employees in that election should be overruled; and (4) a bargaining order is appropriate to remedy the Respondent's unfair labor practices.<sup>1</sup>

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order.<sup>4</sup>

<sup>1</sup> On June 18, 1993, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

<sup>2</sup> The Respondent asserts that the judge's resolution of credibility, findings of fact, and conclusions of law are the results of bias. After a careful examination of the entire record we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the administrative law judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, it is the Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup> We agree with the judge that the Respondent's elimination of the use of a loud buzzer to signal the beginning of shifts and the end of breaks was an unlawful grant of benefit regardless of whether employees requested this change.

Inasmuch as we agree with the judge's conclusions that the Respondent violated Sec. 8(a)(1) of the Act by coercively interrogating other employees concerning their union sentiments, we find it unnecessary to pass on whether David McClure, the Respondent's warehouse supervisor, violated Sec. 8(a)(1) of the Act by interrogating employee Timothy Alguire about the Union on November 8, 1991. Any finding of a violation would be cumulative.

<sup>4</sup> The judge erroneously included James McCrea's name twice and failed to include the names of Carol Ormasen and Shelia Wollman among the list of voters casting ballots subject to challenges which are to be overruled. We note that if a revised tally of ballots shows that a majority of voters cast ballots for the Union, the Regional Director shall issue a certification of representative in addition to the remedial bargaining order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Kinney Drugs, Inc., Gouverneur, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that Case 3-RC-9808 is severed from Case 3-CA-16740 and that it is remanded to the Regional Director for Region 3 for action consistent with this decision.

*Thomas J. Sheridan and Robert A. Ellison, Esqs.*, for the General Counsel.

*Thomas J. Grooms, Esq. (Bond, Schoeneck & King)*, of Syracuse, New York, for the Respondent.

*Christy Concannon, Esq. (Baptiste & Wilder)*, of Washington, D.C., for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

JOEL A. HARMATZ, Administrative Law Judge. This consolidated proceeding originated with the filing of an election petition in Case 3-RC-9808 on October 3, 1991. Pursuant to a Stipulated Election Agreement, an election by secret ballot was conducted on November 22, 1991, with the tally showing that of approximately 41 eligible voters, 17 cast ballots for, and 17 against, representation, with 7 determinative challenged ballots. Thereafter, the petitioning Union and the Employer filed timely objections to conduct affecting the election results.

On November 29, 1991, the initial unfair labor practice charge was filed in this proceeding, and on January 27, 1992, the Regional Director for Region 3 issued a complaint, alleging that the Respondent independently violated Section 8(a)(1) of the Act by various acts of coercion, including interrogation, creating the impression of surveillance, declaring the futility of collective bargaining, granting and promising benefits, and threatening discharge, closure, as well as a loss of benefits and jobs. In light of these alleged illegalities, the complaint further alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Charging Party-Petitioner as the majority representative of employees in the appropriate unit, an allegation invoking the remedial authority approved in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In its duly filed answer, the Respondent denied that any unfair labor practices were committed.

Subsequently, on February 4, 1992, the Regional Director for Region 3 issued his "Report on Challenges and Objections and Order Directing Hearing, Order Consolidating Cases and Notice of Hearing," concluding that the petitioning Union's remaining Objections 2 through 13,<sup>1</sup> the Employer's remaining Objection 1, and the determinative challenges raise material issues of fact best resolved by a formal hearing, and, accordingly, because of the commonality with certain allegations in the pending complaint, ordered that Case 3-RC-9808 be consolidated with Case 3-CA-16740

<sup>1</sup> The Petitioner's Objection 1 had been withdrawn previously.

for the purpose of hearing, ruling, and decision by an administrative law judge. There were no exceptions.

Pursuant thereto, on June 9 through 12, and July 21, 1992, I conducted a hearing in Gouverneur, New York. Following close of the hearing briefs were filed on behalf of the General Counsel, the Respondent, and the Charging Party.

On the entire record,<sup>2</sup> including my opportunity directly to observe the witnesses while testifying, and their demeanor, and after considering the posthearing briefs, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent, a New York corporation, at times material, has been engaged in the operation of an interstate chain of retail drug stores, including warehouse facilities in Gouverneur, New York, the sole facilities involved in this proceeding. In the course of the operation, during the 12-month period preceding issuance of the complaint, the Respondent purchased and received at the facilities, goods and materials valued in excess of \$50,000 directly from points outside the State of New York.

The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Teamsters Local 687, International Brotherhood of Teamsters, AFL-CIO (the Union, the Charging Party, and the Petitioner) is a labor organization within the meaning of Section 2(5) of the Act.

### III. CONCLUDING FINDINGS

#### A. Preliminary Statement

The Respondent's chain of 35 retail drugstores is serviced by a central warehouse or distribution center located in Gouverneur, New York.<sup>3</sup> There is no history of collective-bargaining for employees involved in that operation.

This case emerges from a third effort by the Union to organize the Respondent's warehouse employees. Unsuccessful campaigns were conducted in 1973 and 1977. The 1991<sup>4</sup> campaign was not inspired by a disenchantment with wages, but because certain employees sensed that their grievances were being ignored, while their jobs and benefits slowly

were being eroded. It opened when employee Drew Koerick in September contacted the Union by telephone. In consequence, he and a coworker, Les McClure, on September 10, met with a union representative, Michael Matthews, at Koerick's home. Both signed authorization cards at that time.

A second meeting was held at the same location on September 7; it was attended by Koerick, McClure, and a third employee, Danny Richards. In addition to Matthews, the Union was represented by its president, Fred Carter, as well as a business agent, Dennis Robinson. Organizational literature incorporating blank authorization cards was distributed.<sup>5</sup> Richards signed an authorization card at this time.

On September 25, Matthews wrote Richard A. Cognetti, the Respondent's president. On behalf of the Union, Matthews claimed majority representation, and hence requested recognition and a immediate negotiations, while offering to prove its status through a third-party card check. (G.C. Exh. 6.) On inquiry by Cognetti, the Union, by letter of September 26, clarified the identity of the employees sought. (G.C. Exh. 7.) The Union filed an election petition in Case 3-RC-9808 on October 3, 1991.

The Respondent replied with an antiunion campaign in which it attempted to deliver its message through literature mailed and distributed to employees, speeches to the assembled warehouse employees, and separate meetings with small groups attended by two to four employees.

An election was held on November 22, but the results were inconclusive, since contingent upon resolution of determinative challenges and objections by both parties, all of which are subject to litigation herein.

While it is entirely possible that the election could survive the Employer's objections, and that there could be sufficient affirmative votes among any overruled challenges to furnish the Union a majority, the complaint hedges against this possibility. Under it, the issue of primary concern is remedial, raising the question of whether, irrespective of the final election results, the Employer engaged in unlawful conduct sufficiently serious to warrant imposition of a bargaining order.

In this respect, the General Counsel contends that the Union obtained valid, signed authorization cards from a majority of unit employees, yet, thereafter, during the interim between the filing of the representation petition and the election, the Employer embarked upon a campaign of intimidation and coercion that not only eroded union support, but precluded the holding of a fair rerun election in the future.

The complaint, however, is devoid of alleged discrimination. Hence, any remedial bargaining order turns entirely upon independent 8(a)(1) allegations. The individual charged with the most serious misconduct is Richard Cognetti. The latter has been employed by the Respondent since 1969. In May 1991, he was promoted from senior vice president of operations to president and CEO. In addition to Cognetti, the highest ranking corporate functionary, several allegations attribute 8(a)(1) statements to David McClure, the warehouse supervisor and highest ranking management official with immediate day-to-day responsibility in the warehouse.

<sup>2</sup>Portions of the official transcript of proceeding are garbled almost beyond recognition. With the aid of motions to correct transcript filed on behalf of the Respondent and the General Counsel, respectively, and on the basis of my own notes and recollection, many of the errors are corrected in the attached "Appendix B." [Omitted from publication.]

<sup>3</sup>It is my understanding that following the events in issue, an additional store has been added. Moreover, at the time of the campaign, warehousing operations were carried on at two sites. Thus, a small pharmaceutical warehouse was maintained in the original Kinney store in downtown Gouverneur. That operation was manned by only four or five employees. By the time of the hearing, the pharmaceutical warehouse had been consolidated into the main warehouse located at 520 East Main Street, also in Gouverneur.

<sup>4</sup>Unless otherwise indicated all dates refer to 1991.

<sup>5</sup>Koerick testified that they each received three sets of organizational materials that day, but the next evening Matthews delivered about 20 more to his home.

The Respondent opposes a bargaining order as unwarranted, and seemingly argues that the complaint is built upon a mountain of straw, going on to state in its posthearing brief:

It is the Company's position that the allegations are either outright fabrications or gross distortions of the words and conduct of the Company in the pre-election period. The General Counsel has not alleged that any material aspects of Kinney's formal pre-election campaign violated the Act, and the overwhelming evidence in this case shows that Kinney did not commit the violations with which it is charged. Indeed, if any party has engaged in reprehensible conduct, it is the Union, not the Company.

For the most part, the issues turn on credibility, in the main, pitting incumbent employees, who lack any apparent pecuniary interest in the outcome, against personnel serving at the highest level of corporate management, each of whom, through their denials, attempt to substantiate that not a single unfair labor practice was committed and in each and every instance the General Counsel's witnesses had conspired to falsely accuse their superiors.

### *B. Interference, Restraint, and Coercion*

#### 1. Solicitation of grievances; the October 9 meeting

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act on September 27 when Cognetti solicited employee grievances with implicit or explicit promises to rectify them. The allegation actually relates to a meeting that took place on October 9.<sup>6</sup>

That afternoon, during their shift, the employees were summoned to a meeting with Cognetti. About 30 attended. The General Counsel presented a number of witnesses, all currently employed, to attest to Cognetti's actions on that occasion. Koerick was the first. He related that Cognetti opened by remarking that he had seen the Union's "petition," and it made him "kind of sick." He indicated that it was upsetting that just one or two would make the decision for the entire warehouse. He went on to state that nothing could be done at the time, as his hands were tied.<sup>7</sup> Yet, Cognetti then inquired as to employee complaints about the warehouse. Employees voiced concerns about the I.B.M. system<sup>8</sup> that

was being installed to automate manual procedures and reference to the fact that manpower levels were high enough to service 50 stores, let alone the 34 that were serviced by the warehouse; about a ban that had been placed upon both access to, and drinking coffee at work stations during working time; the failure to follow seniority; and strict enforcement of the 10-minute break period. According to Koerick, Cognetti responded that his hands were tied, and that he would like to see the union thing ended now, adding that the only way it could end "was if thirty of us would go to the union's doorstep and protest against it and say we didn't want it."

Les McClure testified that this was the meeting marked the first time since the prior organization campaign that the Respondent had expressed an interest in employee concerns. More particularly he describes Cognetti's opening remarks as including an admission that he lacked familiarity with conditions in the warehouse and that he just had been learned of the situation. McClure agreed with Koerick that Cognetti asked the employees what the problems were. A litany of problems were addressed. When an employee complained about management's resistance to employee complaints, according to McClure, Cognetti responded that he would do his best "to change things around" and that if it was management that needed to be changed, he would do so. Cognetti went on to state that he wanted to hear all the employee complaints and if they had anything else to say, he would listen and start immediately to rectify the problems.

Randy House, another incumbent employee, testified that in this meeting, Cognetti told the employees not to listen to the "fat guy from Ogdensburg."<sup>9</sup> House confessed to a limited recollection of what was said, but recalled Cognetti remarking that his hands were tied and he could not make any threats or promises, but he would listen to complaints. Several issues were raised, including the denial of coffee privileges during working time. Cognetti allegedly sympathized on that issue, stating that he takes coffee to his office, and if he, as an employee can do it, everybody could.<sup>10</sup>

Another employee, Danny Richards, testified that Cognetti opened by stating that he received a letter indicating that the Union was claiming representation, but his hands were tied and their really was not much he could do. He indicated that he did not realize that their were problems in the warehouse and invited employees to state their concerns. The latter responded with grievances, including the termination of worktime access to coffee. Like House, he testified that Cognetti commented he takes coffee to his desk any time he wishes.<sup>11</sup> At the close of the meeting, according to Richards, Cognetti revealed a suspicion that the appearance of the Union was attributable to one or two people who had a vendetta against Kinney Drugs, but stated that, having heard the problems, he viewed the issue as much larger.

According to Cognetti, he showed the petition at the beginning of the meeting, while observing that certain restric-

<sup>6</sup>The date is in dispute, but Cognetti insists that the meeting in question was held on October 9, after the Union filed the election petition on October 3. Because several of the General Counsel's witnesses, particularly drew Koerick and Les McClure, testified that Cognetti described a document he received as being the "petition," the Respondent is entitled to benefit of any doubt on this question. However, the discrepancy is inconsequential, for Cognetti was fully aware of the incident to which the allegation pertains, there was no indication of confusion or surprise, and the matter was fully litigated.

<sup>7</sup>This obviously was in reference to NLRA restrictions. Employee Dan Richards acknowledged that Cognetti stated that his hands were tied because under the law he could make no changes. On cross-examination, Koerick confirmed that Cognetti added that "there was nothing he could change even if he wanted to, and he could make no threats or promises."

<sup>8</sup>The Respondent makes much of the breakdowns in development of this project, and resulting consternation within the work force.

Obviously, the contractor's failure to deliver as promised, and the attendant problems that ensued would provide no excuse for a failure to adhere strictly to the requirements of the Act.

<sup>9</sup>House understood this to be a reference to Union President Fred Carter.

<sup>10</sup>[No text for footnote.]

<sup>11</sup>Like House and Koerick, Richards testified that shortly after this meeting the coffee privileges were restored.

tions had been placed upon him because of that document. He stated that he could not promise to rectify any problems but "would be willing to listen to anything that [the employees] wanted to discuss at that time, but again . . . would not be able to make any promises to . . . rectify anything. Cognetti relates that this lead to a flood of "comments and remarks," with the basic complaints relating to absence of attention to the warehouse, poor communications in the workplace, unresponsive supervision, and obstacles to the performance of their jobs.<sup>12</sup>

Cognetti's denied making any promises, and asserts that when pushed for a response, he raised the petition, reminding the employees that he could not respond. He claims that the only issues raised by employees pertained to a "lack of communication" with management. The testimony on both sides, to the extent uncontradicted reflects that Cognetti, perhaps, innocently had not previously demonstrated an interest in the concerns of warehouse employees. There can be little question in this light, that the threat of unionization had caught his attention and he seized upon this occasion to urge employees to come forth with their problems, while in unambiguous terms inviting them to repudiate the Union. While the record is devoid of any specific, concrete promise, there remained a clear implication that he would attempt to change things around. Despite Cognetti's disavowals, in context, the employees were not likely to assume that they had been called away from their work because Cognetti was in need of a earful of criticism. They would have been aware acutely that this was neither a sterile exercise, nor one designed to provide a forum in which employee discontent could be aired in an atmosphere of solidarity that would only play into the Union's hands. Workers are sufficiently sophisticated to realize that when management, as part of an antiunion campaign, suddenly evokes an interest in negative shop talk, it is done with implicit understanding that, once the Union is rejected, their concerns will be addressed in positive fashion. In some ways, it is a device that holds open a broader promise of change than could be expected through specific promises.

Beyond the foregoing, the impact of this meeting upon Section 7 rights is subject to assessment in the context of all circumstances in the case. If there was any question in the mind of employees that management would consider, and act favorably on their newly unveiled problems, it would have been clarified by Cognetti's implicit appeal in a campaign letter distributed to employees on November 19, 1992, wherein it was stated:

[A]fter a period of time, September 30th [1992] . . . if the employees felt the Union was needed that . . . we would allow a simple card check and . . . we would accept the word of an impartial clergyman as to the outcome.<sup>13</sup>

<sup>12</sup>Cognetti testified that he did not believe that the coffee issue was raised. I credit the testimony of Koerick, House, and Richards that it was. The Respondent did not call a single employee to support Cognetti's concern as to whether that issue was addressed at that time.

<sup>13</sup>There is neither allegation or claim that this assertion violated the Act. See, e.g., *American Medical Waste Systems*, 311 NLRB 77 (1993). At the same time it is relevant to assessment of what transpired on October 9. In this respect, Cognetti, who was the source of some fascinating euphemisms, assigned an unbelievable

Cognetti's assertions that his hands were then tied did not denude implication that, having ferreted out the grievances, some, most or all would be remedied when his hands were untied. See *Electric Hose & Rubber Co.*, 267 NLRB 488, 490 (1983). As the campaign unfolded, the Respondent would endeavor to apprise employees that the Union was unnecessary, and that once rejected, management would react favorably to the underlying problems that gave impetus to the organization drive. In this context, the conduct of Cognetti at the October 9 meeting, entailed the solicitation of employee complaints under conditions implying that they would be remedied.<sup>14</sup> On the total record, it is concluded that the Respondent thereby violated Section 8(a)(1) of the Act. *Astro Printing Services*, 300 NLRB 1028, 1034 (1990).

## 2. The group meetings

According to the proponents of the complaint, Cognetti's direct involvement in illegal antiunion campaigning reappeared during the second week of November. At that time, the Respondent's strategy of rooting out the causes of employee unrest adopted a new medium. Thus, between November 11 and 14, Cognetti held meetings with small groups of employees. He did not attend these sessions alone, but was accompanied in most instances by a high ranking corporate official, such as Ron Field, the director of human resources, or Wayne Frenyea, the vice president of finance.

The meetings were privately held, involving two to four employees. Management determined who would attend each session. Participation was mandatory and all meetings were held on working time. They were scheduled a week in advance on assumption that they could be held at 20-minute intervals so that all employees could be accommodated in 2

explanation for this part of the November 19 missive. In this instance he states that he was addressing an issue unmentioned by the document itself. He claims that, by the above statement, he simply meant to reply to employees who opined that the Teamsters would lose interest after three unsuccessful campaigns and hence that this was the last chance to organize. To alter the clear import of his words, Cognetti claimed that he made this statement to show that there would be another chance. Surely, Cognetti was aware that any such fear on the part of employees was not a matter within his control, and obviously would not be allayed by his remarks. In any event, if this truly was the argument he sought to answer, it would have been addressed in direct terms. The message conveyed was that Cognetti wanted more time in which to prove himself, an opportunity that would prove effective only if management capitalized, after the Union's demise, by making changes calculated to eliminate the causes of unionization. The plea for additional time was nothing more than an implied promise that management, now awakened, if given a chance, would take steps eliminating the need for a union.

<sup>14</sup>The fact that Cognetti was new to the operation and had no opportunity to head off disenchantment did not excuse his conduct in this regard. See *Great Plains Coca-Cola Bottling Co.*, 311 NLRB 509 (1993). Contrary to the Respondent, *Clark Equipment Co.*, 278 NLRB 498, 501 (1986), does not, on any broadbrushed basis, permit employers to solicit grievances while making "general statements that conditions will improve." Such remarks were approved only where the remark was made in the context of "ongoing improvements instituted . . . prior to the union campaign." Nothing of this nature was underway prior to the advent of the Union in this case, and Clark Equipment is of no comfort to the Respondent.

days. However, the schedule could not be maintained, for the meetings ran from 45 minutes to several hours.<sup>15</sup>

Apart from the opportunity to deliver antiunion propaganda, these meetings were integrated into the Respondent's ongoing effort to identify the grievances that had led to union activity. Ron Field testified that Cognetti would open with an explanation of the reason for the meeting and then would state that "if any of them had any concerns or questions" that, subject to legal constraints,<sup>16</sup> they would attempt to do so.

Cognetti admittedly believed that the Union emerged because of a lack of communication between management and the warehouse employees. He conceded, albeit obliquely, that the group meetings were calculated to overcome this oversight, and, thus, to neutralize this issue. In this regard, he testified:

Based on how well I was treated by these people and how well every single meeting with every single employee went I was thrilled[.] I said my gosh simply by listening to these people, giving them a little bit of attention we're going to win.

The testimony offered by the General Counsel in this case emerges from participants in four of the groups. As the testimony goes, in the course of these sessions, Cognetti presented a variety of arguments against union representation. Beyond that, the General Counsel and the Charging Party contend that his stated positions were often interspersed with unlawful comment. Thus, the complaint alleges that the Respondent violated Section 8(a)(1) based upon Cognetti's alleged remarks that if the Union were designated, employees stood to lose benefits; he would not bargain; and that he would bargain in bad faith and lock out the employees, and, further, that he created the impression that union activity was subject to surveillance.

Koerick, Woods, and McClure. Ron Fields and Cognetti met with this group.<sup>17</sup> During the meeting, arguments were made against unionization, including publication of the salaries earned by union officials and a comparison of Kinney benefits with that of union labor.

McClure and Koerick attest that Cognetti went further. According to McClure, at the outset, Cognetti stated that he was not allowed to make changes or promises. He, nevertheless, observed that he was new and did not realize what was going on in the warehouse. He therefore inquired as to their problems. The employees responded, noting a loss of sick time

and coffee drinking privileges<sup>18</sup> and the annoying buzzer, which during this very session had gone off three times, disrupting Cognetti. Cognetti allegedly agreed on the buzzer issue,<sup>19</sup> but went on broadly to appeal that employees "just give him a year . . . [and they] . . . would notice a lot of changes . . . and just basically . . . how things were going to get a lot better if . . . we just give him a chance." An appeal was made that if the employees were not satisfied after a year that the Union would be recognized on the basis of a card check.<sup>20</sup> It was stated that the doors were open and that the employees should feel free to bring their problems to the attention of management.<sup>21</sup> Concerning negotiations, McClure testified that Cognetti stated that they would go to the bargaining table, but "would never reach an agreement with the Teamsters Union."

Koerick's testimony on this latter issue was more complete. He agreed with McClure that Cognetti said that he would go to negotiations, "but he wouldn't bargain." On cross-examination, Koerick admitted that Cognetti discussed the mechanics of collective bargaining including the fact that neither party is required to accept the others proposals and that the Union could trade off existing benefits, creating the possibility that employees would not end up "where they started." Cognetti added that negotiations sometimes lead to strikes, noting that a strike at a local zinc mine was long and bitter, costing most of the strikers their jobs through permanent replacement. Koerick then testified that Cognetti allegedly stated that he would produce a stalemate, and use his power to cause a lockout which he could do legally. When Koerick advised that he was against a strike, and he would not vote to strike, Cognetti said that he would still lock them out, and could "just shut the doors."<sup>22</sup> Cognetti also allegedly told Woods and McClure that they and their families had more to lose in the event of a lockout than Koerick, who unlike them, had not been fully vested in the retirement program. During the meeting, according to Koerick, Field asked why Koerick wanted a union. When Koerick asked what made Field think that he wanted a union, Field rephrased, asking what Koerick thought a union would do for him. Koerick replied that he felt the union could negotiate their

<sup>15</sup> R. Exh. 5 is an attempt at accounting for particular times and dates of meetings with particular individuals. However, it was prepared solely for purposes of this proceeding, and from recollection and from unspecified partial notes. Accordingly, the document has no special reliability, and were it necessary to determine the precise timing of the meetings, it would be given less weight than sworn testimony offered in that regard.

<sup>16</sup> The goal behind this endeavor was articulated by Wayne Frenyea when he described an issue raised by an employee at one such session as "very, very important to us in trying to find out what the problems were in operating the warehouse."

<sup>17</sup> It was probably more than just coincidence that this grouping assembled the three employees that Cognetti believed to be the key employee organizers.

<sup>18</sup> McClure must have been in error in this respect, for, as previously indicated, coworkers testified that the coffee drinking privileges had been restored shortly after the October 9 meeting.

<sup>19</sup> McClure was again mistaken here, for it was Cognetti that voiced this objection, rather than an employee. However, I have heretofore concluded that the Respondent violated Sec. 8(a)(1) by shutting off this device of pollution that had been tolerated for a period of 10 years prior to advent of the Union.

<sup>20</sup> Cognetti denied that any card check offer was made during the group meetings.

<sup>21</sup> McClure was not certain, but testified to his belief that the feared that full-time employees would be replaced by part-timers might have been discussed as well, and that Cognetti professed to be unaware of the situation.

<sup>22</sup> Field testified that whenever the lockout issue was raised, the employees were told, "We're not going to lock anybody out." He avers that he never sat in on a meeting where employees were told they would be locked out. There was no qualification. I do believe, however, that Cognetti mentioned the possibility in light of what had occurred at St. Joe Mineral, pointing out that Kinney would do the same thing in the event of violence to protect its assets.

wants and needs and establish seniority rights.<sup>23</sup> Finally, Koerick testified that Cognetti stated that he was aware of the union meeting scheduled for Thursday night and would appreciate it if the men went to a movie, hunting, or fishing, rather than attend.<sup>24</sup>

Cognetti denied stating at any of the group meetings that the Company would refuse to bargain with the Union, or that he would refuse to agree to demands or refuse to negotiate. He admits that the mechanics were discussed in the sense of trade offs, but denies that employees were told that benefits would be lost outside that process.<sup>25</sup>

Like Cognetti, Field denied that, Cognetti asked for time to prove the Union was unnecessary. According to Field, the only mention of time related to an ongoing appeal for patience until “quirks” attributable to the IBM project were worked out. He denied any statement that, if the Union got in, Cognetti would not negotiate, or that they would negotiate to impasse and then lock out the employees.

The complaint alleges that during this meeting, the Respondent violated Section 8(a)(1) of the Act by declarations on the part of Cognetti that he would not bargain with the Union and that if the Union were designated, he would force a lockout. However, employers are free to explain the negotiating process to employees, and to go so far as to state that employees are not guaranteed that they will gain through collective bargaining. See, e.g., *Baton Rouge Hospital*, 283 NLRB 192 (1987); *Telex Communications*, 294 NLRB 1136, 1140 (1989). In addition, employers are free to educate as to the circumstances in which employees are subject to legitimate lockout. *Santa Rosa Blueprint Service*, 288 NLRB 762, 763 (1988). Campaign material in this area often is drafted by or otherwise originates with professionals.<sup>26</sup> More often than not the argumentation is carefully conceived and no less intricate than the negotiating process itself. Rare is the case where the exact terms are ingested objectively by employees, who are capable of relaying the complexities months later under oath with precision. Nevertheless, where it is alleged that an employer has exceeded Section 8(c) of the Act by such commentary, there must be credible evidence as to the words and context actually used. Here, however, the witnesses that testified on behalf of these allegations provided

versions of what was said that were inconsistent and apparently incomplete. Their testimony furnishes no reliable basis for analysis of whether the Respondent exceeded privileged argumentation. The General Counsel’s case is not supported by persuasive evidence in this respect and shall be dismissed.<sup>27</sup>

Finally, the complaint alleges that during this meeting, the Respondent violated Section 8(a)(1) of the Act through Cognetti’s threat that employees would lose benefits in consequence of unionization.<sup>28</sup> His statement that Woods and Les McClure had a lot to lose because their pensions had vested falls into this category. Having been made by a high level official, with obvious authority to enhance the risk, the remark is not to be lightly dismissed as “a pure statement of fact.” In this respect, I credit Koerick over Cognetti and Field, neither of whom were reliable witnesses. Based upon the credited testimony of Koerick, which corresponds to a remark attributed to Cognetti at their group meeting by incumbent employees Randy Sibley, Randy House, and Danny Richards, I find that this allegation has been substantiated to this extent.

*Mae Cryderman, Rita Smith, and Nancy Turnball.* Cognetti and Wayne Frenyea met with this group on November 12. Cryderman testified that Cognetti said that if the Union were designated, they would have to close the doors and lock out the employees in the event of violence to protect the truckers and the building. As I understand Cryderman’s testimony, this statement was made in conjunction with Cognetti’s reference to the local zinc mine strike at St. Joe Mineral, and the violence associated with it. Cryderman was uncorroborated, and I was not convinced that she had a grasp for recall sufficient to present a reasonable accurate, detailed account of the words used by Cognetti.<sup>29</sup> As indicated, deter-

<sup>23</sup> The complaint does not allege that the Respondent violated Sec. 8(a)(1) by any interrogation on the part of Field, and it is assumed that those who drafted the complaint had reason to believe that it was concoctive.

<sup>24</sup> This comment by Cognetti failed to substantiate that the Respondent violated Sec. 8(a)(1) by creating an impression of surveillance. The union meeting in question was open and one which presumably was widely publicized within the voting group. It would be unreasonable to deduce that Cognetti learned of it through other than legitimate means, and employees would have no realistic basis for assuming surveillance was involved. The allegation to that effect is dismissed. *Weather Shield of Connecticut*, 300 NLRB 93 (1990).

<sup>25</sup> In his prehearing affidavit, submitted to the General Counsel, Cognetti swore that “The subject of bargaining negotiations did not come up in the small group meetings.”

<sup>26</sup> This subject was mentioned in a speech delivered by Cognetti on October 25. ALJ Exh. 1(b). It was expanded upon in a letter to employees dated November 5. ALJ Exh. 1(a). It is not inconceivable that Les McClure and Koerick, once made privy to this complicated discussion of collective bargaining would draw the same conclusions from this entirely legitimate dialogue and describe it as making they same points they attribute to Cognetti at their group meeting.

<sup>27</sup> The General Counsel would excuse the weakness in his case on the basis by quoting *NLRB v. Rollins Telecasting*, 494 F.2d 80, 82 (2d Cir. 1974), in which the court stated, “An employer who goes close to the brink takes the risk that employees may honestly misunderstand him.” This liberal standard does not absolve the General Counsel from presenting credible proof that an employer had gone sufficiently close to the brink. This has not been done here.

<sup>28</sup> Field testified that several employees expressed concern during the sessions that if the Union were designated they would lose their pensions. He testified that he heard nothing from company representatives that would have contributed to this concern. The only reference to benefits that Field could recall was a comment on his part that the Teamsters pension plan was underfunded while that of Kinney was overfunded. Field also testified that when employees would “raise” questions concerning the nature of collective bargaining, management would point out that they would start from a clean slate and nothing was given, but had to be negotiated. Field like other representatives of management was not a trustworthy witness. Although my doubt as to his credulity is hosted by a number of factors, I was suspicious of his proclivity, like that of Warehouse Supervisor Dave McClure, to pass off subject matter set forth in the complaint as always being raised by employees. Not a single employee was called to substantiate that this, even once, was the case.

<sup>29</sup> Cognetti testified that the subject of a lockout was raised during most meetings, but, as far as he could recall, always by the employees. However, in his prehearing affidavit submitted to the General Counsel, Cognetti swore that “the issue of a strike or lockout was not brought up [in the group meetings] by myself, Field, or any other employees.” Cognetti for this and more important reasons to be considered, infra, was a most unreliable witness. However, my

*Continued*

mination that he exceeded protective guarantees must be based upon the words actually used, rather than the witnesses interpretation, and in this instance, it was my impression that Cryderman failed to substantiate anything other than a remark that in the event of violence, the Respondent might seek to preserve its resources by resorting to a protective lockout. For the reasons already expressed, such argumentation is privileged under Section 8(c) of the Act.

*Randy House, Danny Richards, and Randy Sibley.* All three members of this group testified. First, Sibley recalled Cognetti stating that the Company had the legal right to lock the doors and not let employees come to work. Sibley, an employee with more than nine years' service, was told by Cognetti that as a senior employee, he believed that, if the Union came in, Sibley had a lot to lose since he was vested in the Respondent's pension and stock purchase plans. Sibley's testimony does not disclose the context in which Cognetti made this remark, and he admittedly had no recollection of any other specifics of this meeting of about one-half hour.

House testified that Cognetti said he was new in his position and unaware of the problems in the warehouse. He appealed that the employees give him a chance. He allegedly also stated that the day the Union came in, he could "put locks on our doors" and "shut our benefits off." House confirms that Cognetti told Sibley that he had a lot to lose because his retirement benefits were already vested. House had limited recollection concerning this meeting, and did not remember whether Cognetti discussed the mechanics of collective bargaining and what was meant by the give-and-take process. He could not recall the context in which Cognetti referred to benefits or if it was in the context of the union/nonunion benefit comparison.

Richards testified that, in making the comparison between union and nonunion benefits, Cognetti discussed aspects of negotiation, stating that:

[B]efore the employees would gain anything, something would be taken away from what we already had. We could lose our benefits, our ESOP, things like that before we'd actually gain anything.

Cognetti also said, however, that negotiations is a process in which one might be willing to give something up to get something else. Richards confirms that Sibley was told that he should speak up, as he was one of the senior men with vested rights, and he had a lot to lose. He also agreed that Cognetti mentioned that he had held his position for only 90 days, and appealed that he be given a chance to prove that employees were wrong in the opinion they held toward him, and that they wait a year, and then if they wanted a union, he would not fight it. Richards testified that there was a ru-

view of the immediate issue does not turn upon his credibility, but, rather, upon a proof failure on the part of the General Counsel. I would note, however, that the General Counsel's own witnesses to an extent confirm that Cognetti adverted to a lockout in context of the St. Joe Mineral situation, where after several violent incidents, St. Joe had to lock its doors to protect its property. In this respect, Cognetti testified that when the employees persisted in inquiries about a lockout, management replied that "only if there was a situation where our property was threatened due to violence would we lock the doors on our warehouse."

mored lockout, and one in his group asked Cognetti about it. The latter allegedly replied that that it was possible after a certain number of days, but that everyone would be locked out if it happened.<sup>30</sup> Finally, Richards admitted that when someone in the group expressed concern for his own job, reference was made to the fact that Kinney does not fire people.

Having considered the testimony, I am unwilling to find that Cognetti made unlawful reference to a lockout. The testimony of the three employees gives three different versions of his remarks in that regard. Richards testified that it was raised by an employee, rather than Cognetti. Sibley, as was true of Cryderman stated that he believed that Cognetti referred to the violent strike at St. Joe Mineral and the fact that the latter had to padlock the gates as a protective measure. Sibley added that it was possible that the reference by Cognetti to locking the doors may have been a reference to what he would do in the event of violence toward Kinney Drug, although Sibley avers that he did not understand it that way. In my opinion, the testimony of Sibley, Richards, and House fails to isolate the exact language used by Cognetti in any persuasive fashion, and, to that extent, offers an unreliable vehicle for testing the parameters of Section 8(c) of the Act in connection with statements imputed to Cognetti at the time.

The allegations that the Respondent violated Section 8(a)(1) of the Act based upon remarks concerning the mechanics of bargaining are also dismissed on the same ground, namely, the absence of a consistent, reliable pattern of testimony as to the language and complete argumentation made by Cognetti in that regard.

I did, however, believe their mutually corroborative testimony that Cognetti warned Sibley that he had more to lose because his pension was vested. Cognetti, in denying any "threat," admitted that Sibley might have been reminded that he was vested, a remark that would tend strongly to imply that Sibley stood to suffer if the Union were designated. It is concluded that the comment attributed to their chief executive was not manufactured by these incumbent employees, and that, as it tended to impede the exercise of Section 7 rights, the Respondent thereby violated Section 8(a)(1) of the Act.

*Thomas McFerran, Carl Burns, and Dave Herheim.* McFerran, a former employee who had been discharged on the basis of an alleged theft, testified that his group met on two occasions with management.<sup>31</sup> At the first such meeting, Cognetti assertedly discussed what would occur in negotiations if the Union were designated, by stating as follows:

[T]he main point was we would lose a lot of benefits that we had. Kinney's would fight over the negotiating table and that we would be worse off with anything that the Union could give us compared to what Kinney's did give us and could give us.

<sup>30</sup> Richards had no recollection of whether Cognetti linked the lapse of "a certain number of days" to unsuccessful negotiations. Cognetti could not recall ever mentioning the duration of a lockout, and he specifically denied stating that the employees would be locked out in connection with collective bargaining.

<sup>31</sup> In addition to his discharge, an arrest warrant was subsequently issued against McFerran based upon an alleged bomb threat against the Respondent. Against this background, his testimony is rejected, to the extent uncorroborated.

According to McFerran, Cognetti did not specify just what benefits would be affected. On cross examination, McFerran also acknowledged that the employees were informed that the process of negotiations involves give and take and a party might concede something away to get something else, and that Kinney could not “be made” to yield to a union demand. When cautioned by me that findings upon his testimony required the words used by Cognetti, as distinguished from impression or interpretation, McFerran replied, “I cannot remember the exact words that were said.”

Burns testified that at the first meeting, Cognetti said that they would play hardball with the Union and would not negotiate. On cross-examination, Burns admitted to the possibility that Cognetti might have explained the process of negotiations, in terms of give-and-take, and the barter concept, and that the law does not compel the Company to agree to union demands.

A second meeting apparently on November 13. McFerran testified, and Burns basically agreed, that on this occasion, Cognetti was accompanied by Dave McClure, but Wayne Frenyea entered toward the end.<sup>32</sup> Cognetti, referred to a letter that he had distributed to the employees, and appealed for time, up to a year, to correct discrepancies in the warehouse, and that while he wasn't sure as to how they were leaning, he would like all three to “go out and persuade other people to vote ‘No’ for the Union and that he'd like to see a thirty-five to zero vote.”

Burns added that the second meeting that Cognetti with the aide of documentation, made a case against the Union by stressing existing benefits and by comparing those negotiated by unions elsewhere with those of nonunion employers. In the course thereof, Burns declared that he was leaning toward the Union, whereupon Cognetti asked why. Burns explained that he felt his job was threatened by the hiring of part-time employees, and wanted job security. When Cognetti attempted to disabuse him of this concern, Burns referred to threats to Les McClure and Otis Woods. Cognetti denied that this happened, whereupon Burns stated that he knew Woods and McClure for a long time and felt he knew who was telling the truth. Cognetti stated that no one's job would be in jeopardy as a result of this union campaign, including Woods and Les McClure. Burns recalled that during the second meeting, Cognetti stated that he would appreciate it if the three went out and urged coworkers to vote “no” and to show support for the Company by not attending any more union meetings. It is averred that Cognetti added that he knew who attended and read off numbers that attended that, according to Burns, were “right on the money.”

As was true of other witnesses presented by the General Counsel in support of like allegations concerning what would transpire in collective bargaining, the testimony of McFerran and Burns does not rise to a level arousing confidence that the remarks attributed to Cognetti were anywhere close to the specific arguments advanced. As in the case of the others, their testimony struck as an interpretation, dimmed by the passage of time, as to the points actually made. Accordingly,

<sup>32</sup> McClure denied attending attending a meeting involving Cognetti, Frenyea and either McFerran and Herheim. Frenyea, to his recollection, did not attend a meeting involving Herheim, Burns, and McFerran. The issue need not be resolved.

the allegation in question is not substantiated by a reliable accounting of what was said and shall be dismissed.

On the other hand, I credit the mutually corroborative testimony of McFerran and Burns, an incumbent employee, over Cognetti's denials, that he appealed that they campaign against the Union and decline to attend union meetings in the future. This would likely be construed as a directive from the highest ranking official of the Company, and would tend to coerce those present in the exercise of their Section 7 rights. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act in this respect. See *Salvation Army Residence*, 293 NLRB 944, 970-971 (1989). However, I am inclined to give the Respondent benefit of the doubt as to Burns' uncorroborated testimony concerning an awareness on Cognetti's part as to the number of employees that attended union meetings,<sup>33</sup> and to dismiss the allegation that any such comment was made during this set of group meetings.

### 3. The corrective action

The General Counsel contends that in certain areas the Respondent took corrective action with respect to certain problems raised at the October 9 meeting. Thus, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by restoring coffee privileges, by shutting off a buzzer, and by promoting part-time employees to full time.

As for the coffee privileges, it appears that prior to the campaign employees were permitted to leave their work to obtain coffee outside of their normal breaks, consuming it while on duty in their work areas. This practice was curtailed, also before advent of the Union. Based upon credited employee testimony, I find that the issue was raised at the October 9 meeting, Cognetti expressed sympathy, and shortly thereafter employees were permitted to obtain and consume coffee during normal work periods.<sup>34</sup>

By way of defense, the Respondent appears to recast the issue. Thus, by way of brief, the Respondent states that “the employees complained that prior to the union campaign, the coffeepot in the breakroom was no longer turned on before they arrived at work at 7:00 a.m., and they were, therefore, unable to drink coffee during work time before their 9:00 break.” It goes on to explain that the problem was resolved inadvertently by Ron Field, the human resources manager. Only under the brief's interpretation does Field's explanation make any sense. His professed role was an instruction that the coffeepot be turned on prior to the commencement of the work shift. Thus, Field asserts that after the union campaign got under way, he reported to the warehouse regularly, instructing Dave McClure to have the coffeepot on before his arrival at 6:15 or 6:30 a.m. On this basis, it is argued that the employees were an indirect beneficiary of Field's request. However, the explanation is narrower than the grievance and its solution.

<sup>33</sup> Cognetti denied ever telling employees that he knew the number of employees that attended union meetings, or that such data was possessed in writing. As shall be seen, McFerran attributed the identical comment to a meeting of all warehouse employees conducted by Cognetti shortly after the union meeting of November 7.

<sup>34</sup> The complaint erroneously alleges that this change occurred on October 1. The discrepancy is consistent with the General Counsel's misapprehension that the October 9 meeting took place on September 29. The variance is not material.

However, this contention employees a traditional “straw man” approach, relying on testimony that fits neither the grievance, nor its solution. It does not counter mutually corroborative testimony from employees Koerick, House, and Richards, who attest to the fact that, prior to the campaign, an existing practice was stopped so as to deny employees access to the coffeepot during working time. They also aver that this was corrected shortly after the October 9 meeting.<sup>35</sup> Field’s explanation falls short of combatting uncontradicted testimony that once the coffee restriction was retracted, employees again were permitted to drink coffee *throughout the workday*.<sup>36</sup> Obviously, Field perceived the problem as based upon the contents of a single pot of coffee, while the employees, who were in a position to know better, understood it as privilege that extended throughout their shift. Dave McClure, who would have been alert to what was going on in the warehouse after the first pot of coffee had been consumed, and who also would have been responsible for enforcing and relaxing rules affecting warehouse personnel, was not examined as to such a restriction or its removal.

In sum, while Field claims responsibility, and hence acknowledges that a change was made during the critical preelection period, his testimony does not reflect that he understood its nature and scope. Although Cognetti denies that he adjusted the coffee access rules, the Respondent has failed to contradict the testimony of employees as to the fact and dimension of this change. While by no means of major concern, this step on the part of the Respondent would be taken by employees as an expression of good faith, transmitting management’s readiness to deal with employee complaints without need for intervention of third parties. The Respondent violated Section 8(a)(1) by eliminating the restriction described by credited, undenied testimony of employees, without offering any explanation tending to dissociate such action from a desire to influence the impending election.

A more pronounced change affected three particular employees. Thus, at the time of the October 9 meeting, Rita Smith, Vicki Bice, and Sally Ayen were regular part-time employees. Among the concerns mentioned to Cognetti at that time was the fear that part-time help would be used to replace full-time employees. According to the Respondent’s personnel records, Smith, Bice, and Ayen were upgraded to full time on October 25. (R. Exh. 6.) The General Counsel argues that this step was in response to the aforementioned complaint concerning the utilization of part-time personnel. This certainly was a step in that direction even though a larger group, numbering at least six employees were retained in their capacity as part-time workers.

Cognetti explained credibly that the employees in question were working full-time hours, if not more, and management preferred to upgrade them, rather than hire additional part-time employees. There is no doubt that the reclassification was explainable in terms of the ongoing, intense demand for labor, as new stores, one extraordinarily large, were added, yet promised labor savings due to the IBM project had not materialized.

<sup>35</sup> The Respondent did not rebut employee testimony that prior to October 9 they were denied access, except on breaks, to the coffeepot.

<sup>36</sup> Cognetti denied ever making any decision respecting coffee during the campaign. However, I refused to accept that the employees concocted their testimony that a change was made.

However, elections would seldom be insulated from the influence of employer economic strength if management were free during the critical preelection period to grant economic benefits just because they made good sense. Here, the underlying rationale for the promotions was not shown to have arose suddenly,<sup>37</sup> under conditions compelling a need for immediate action. The reclassifications took place only 5 weeks prior to the scheduled election, and was a gesture likely to enamor at least three eligible voters to the Respondent’s clearly communicated goals in this campaign. The decision entailed a reward whose timing would not be recognizable by those affected and other employees as a product of prior practice. See, e.g., *Trump Plaza Associates*, 310 NLRB 1162 (1993). In sum, no reason is evident as to why this discretionary act was not deferred for the relatively brief period that would have prevented undue advantage in the impending election. Accordingly, it is concluded that the Respondent violated Section 8(a)(1) of the Act by elevating Smith, Bice, and Ayen to full-time status.

Cognetti denied that there was any reference to the buzzer at the October 9 meeting. Although Drew Koerick initially testified that employees also complained about installation of a loud buzzer to announce the start of shifts and the end of breaks. Later, on cross-examination, he acknowledged that this was not mentioned in that meeting, but raised by Cognetti himself at the group meetings in November when he asked if shutting it off would help.

Les McClure confirmed that the issue was raised during the group meeting in November. He acknowledges that, in the course of that session, it had gone off three times, disrupting Cognetti. The latter acknowledged the disruption, and that, after learning its purpose, asked Dave McClure if the buzzer could be turned off “while we were holding meetings.” Cognetti does not deny that the very next day the buzzer was turned off for good.

The Respondent’s contention that the issue was not raised by employees is inconsequential. No one appears to hold any reservation that the buzzer was obnoxious—a common trait found generally in industrial buzzers. In my opinion, the key to the inquiry is uncontradicted testimony by Les McClure that this condition had existed since the buzzer was installed some 10 years earlier. In this light, though the change might be viewed in some quarters as trivial, it exemplified corrective action with respect to an existing condition, and was symbolic of management’s newly gained sensitivity and responsiveness to an improved working environment. While not of major consequence, the innovation fell within the range of conduct impermissible during an organization campaign, and the Respondent thereby violated Section 8(a)(1) of the Act.

#### 4. Otis Woods and Les McClure

##### a. Preliminary statement

Testimony was adduced from several of the Respondent’s witnesses, all of whom now were part of the supervisory staff, that, according to observations and discussions with

<sup>37</sup> Labor demands in consequence of the IBM project were evident before the petition was filed. For this reason, and during that time frame, the Respondent in September hired five new part-time employees and retained a student.

employees, by November 11, the Company was in pretty good shape heading in to the election. During that week, however, on November 13, Cognetti, the Company's most prominent functionary, far from any sense of confidence, shifted direction in a manner that could explained only as an act of reckless desperation.

It is undisputed that Cognetti singled out Woods and Les McClure that day for separate back-to-back meetings. It is alleged that, in the course of those meetings he threatened each with discharge if they did not meet with employees, and attempt to influence the latter against the Union, while instructing that they not attend union meetings. In response, McClure and Woods met with employees the next day, and the General Counsel contends that, in doing so, they acted as agents for the Respondent, which further violated Section 8(a)(1) when they reported to coworkers that they had been threatened with discharge had they refused to persuade those assembled as to the virtues of Cognetti and to reject the Union.

As shall be seen, Cognetti denies virtually all material testimony offered by Les McClure and Woods, the probability of which is substantiated not only be the unlikelihood that these senior employees would pitch battle with the company president on the basis of an arsenal of lies, but by a bevy of current employees, who attest to reports by the latter as to their meetings with Cognetti. Cognetti admits that the two meetings took place in tandem, but denies that they were otherwise related. He claims that he met with the Woods to solicit his assistance in refuting rumors of a "hit list," a tale that had emerged during the group meetings and was turning to the Union's advantage. He claims that he met with Les McClure concerning an entirely different issue; namely, employee complaints, also finding their origin in group meetings, that the latter's dispute with his brother, Warehouse Supervisor Dave McClure, was disrupting their work.

#### *b. Cognetti/Woods meeting*

Otis Woods testified that on the morning of November 13, he was summoned to meet with Cognetti in the foreman's office. No one else was present. Cognetti indicated that he thought Woods was involved in union organization, but Woods denied that this was so.<sup>38</sup> According to Woods, it was his impression that Cognetti did not believe his denial, for Cognetti said, in that regard, that he worried more about Woods than Koerick. Woods, who is now a supervisor and showed a reluctance to testify against the president of the Company, went on to relate that it was "asked," or "suggested" or that he was "told" to attend a meeting and "explain to the people that the problems [Kinney's] was having wasn't [Cognetti's] . . . fault. . . . [and] Kinney was a good company, fair." Woods added that he was told that "[i]f the union got in—my job couldn't be guaranteed."<sup>39</sup>

<sup>38</sup> Woods signed an authorization card on September 23, several weeks after the initial union contact, and attended four union meetings, but apparently engaged in no other union activity. Anthony E. Cousino is currently the receiving manager, but during the campaign, he was a receiving clerk, and an eligible voter. He testified to an "understanding" that the spokesmen for the Union were Koerick, Les McClure, and Otis Woods. The foundation for this understanding is not defined, and, accordingly, it is given no weight.

<sup>39</sup> Compare this statement with the assurance contained in Cognetti's allegedly unlawful letter of November 19. G.C. Exh. 9.

On the other hand, he was also told that if he either held or participated in the meeting, his job would be guaranteed. Cognetti also allegedly said that if Woods attended another union meeting, he would know about it before Woods reached his home.

After the meeting, Woods walked off the job because he was "upset" in consequence of both Cognetti's accusation that he was a union leader and threat to his job. That same day, he contacted the Union concerning this meeting, and on advice of union representative Matthews, that same evening, prepared a statement as to what had transpired with Cognetti. (G.C. Exh. 10.)

The fact that Woods left the plant in mid-shift that day is not contested by the Respondent. Several employees attest to the fact that Woods left the meeting with Cognetti in a state of distraught. Wendell Scott, an employee with 17 years' service, and Woods' brother-in-law, testified that he encountered the latter shortly after the Cognetti meeting. Scott described his face as pale and his appearance as visibly shaken.<sup>40</sup> Woods allegedly informed Scott that he had just come from a meeting with Cognetti, reporting that the latter "had asked him to call a meeting for the following morning and try to discourage people from voting for the Union." Woods stated that he "could be fired" if he failed to do so. As Scott recalled, Woods reportedly asked Cognetti if his job would be guaranteed if he held the meeting, and that he was told that there was no guarantee either way, and that if Woods attended the union meeting scheduled for that night that there was "a pretty good chance that his job was in jeopardy."<sup>41</sup> Woods also stated that Cognetti warned that he would know if Woods attended the union meeting before he reached home. Finally, Woods reported that Cognetti stated that he would deny that this meeting with Woods had taken place. Scott added that Woods, in his state of upset, indicated that he was going to quit, and had to discuss it with his wife, Scott's sister. Scott could not calm him down and Woods left the plant. A few hours later, Woods returned to work, and according to Scott, had calmed down, but still showed a lot of strain.<sup>42</sup>

Critical aspects of Woods' account were denied by Cognetti. He justified his calling Woods to the office on the basis of information developed in the small group meetings. He expressed a belief that, as the group meetings continued, the effort to defeat the Union made great strides. This course was disrupted, in his opinion, by feedback that same week that the Company had a "hit list." Cognetti explained that, prior to the November 11 group meeting with Koerick, Les McClure, and Woods, he had not heard reference to that

That document provides job guarantees to union organizers only if the Union were defeated.

<sup>40</sup> Koerick and Les McClure also testified that they encountered Woods as he was leaving and similarly concluded that he was visibly upset.

<sup>41</sup> There is no evidence that a union meeting was held or scheduled for November 13. One did take place on November 14. See G.C. Exh. C-8(b).

<sup>42</sup> Scott's testimony is not immediately binding upon the Respondent, but is probative to the probability of Woods' sworn versions of what transpired.

phrase.<sup>43</sup> He adds that at many subsequent meetings, employees would raise the issue. He added that, each time, he dismissed the idea, stating that no one would be fired if “we” won the election.

Nevertheless, as I understand Cognetti’s testimony, he believed that his assurances fell on deaf ears. He claims that within 2 days after the first group meeting the “hit list” had become a “bombshell” that had to be dealt with, as employees were saying:

I don’t want to vote for this union, but I’m not going to let you, Mr. New Guy come in here and fire my friends, I’ve got to vote for the union even if I don’t want to because I got to . . . stick by my buddies.

They allegedly reported that:

[T]hey really didn’t want to vote for the union, but in order to save Les, and in order to save some of the other organizers . . . their implications to me was, they were more concerned with maybe some of the other . . . organizers . . . other than Les. To . . . me I was interfering with a free election and they seemed to be sympathizing with Otis and the fact that if Les got fired, then Otis would get fired. And other organizers would get fired with them. So, the hit list thing just kind of mushroomed in our face . . . and it was becoming extremely, extremely frustrating.<sup>44</sup>

Cognetti claims that he turned to Woods to help him out of this dilemma. He believed that Woods and McClure were the organizers, and that Koerick was the principal union contact.<sup>45</sup> As between them, Cognetti claims that he was concerned about Woods because of his popularity, leadership

qualities, and persuasive influence among coworkers. He believed that the employees were concerned about Woods, not McClure, and that Woods “was going to beat me with this thing.” He claims that he decided to meet with Woods because he regarded him as a “friend” that he could approach and whose leverage in the warehouse could be used to advantage, particularly, since Cognetti viewed Woods as having more credibility among the workers than he had. Cognetti went on to relate “I wanted to ask him for his support to see . . . if he was really on our side and was . . . simply looking for some type of offer.”

However, Cognetti’s own version reveals that he did not open with dialogue usually characteristic of friendly persuasion. He admittedly opened by thanking Woods for starting the organization campaign “and for manufacturing this hit list idea,” and the sympathy you got from it.<sup>46</sup> Cognetti went on to testify that he appealed to Woods, “Unless you come forward and . . . help me quell this hit list idea, I can’t win, you got me beat.” Woods reacted with an emotional denial that he was a union organizer, claiming that he had nothing to do with it. Cognetti asserts that he tried to calm him down assuring that Woods would not be fired, stating “I just want you to help me.” He claims to have appealed to Woods that he could not “stop this firing nonsense unless you talk to the people.” Woods, however, became hysterical, stating such things as, “I’m out of here, I can’t handle it anymore. . . . I’m not your man. . . . I’m not your man.” Cognetti claims that Woods was totally out of control, and that he did not know what to do, so he told Woods “get out of here.” Cognetti denied that any reference was made to the Clearview Hotel, or Woods’ attendance at union meetings.

#### *c. Cognetti/McClure meeting*

Cognetti claims that Woods’ inflammatory reaction, in what he described as a very brief meeting, convinced him that the idea of meeting with Woods was “a mistake.” Yet, he followed that meeting by risking another unwitnessed, on his own account foreseeably inflammatory session with Les McClure, another perceived union leader. Cognetti explains that he did so because both meetings were preplanned and they were topically unrelated.

McClure’s account indicates that the similarity of the meetings was based upon more than their timing. He avers that Cognetti opened by pointing his finger at McClure, while accusing the latter of having done a fine job running the Union’s campaign and now it was McClure’s turn to inform the employees to vote against the Union. When McClure asked why Cognetti had singled him out, the latter replied, “because you’re the organizer.” Cognetti added that if this was not the case, to give him the names of those who were. According, to McClure, he was then told that:

<sup>43</sup> At that time, Les McClure admittedly stated that he knew there was a “hit list” out there, that his name was on it and, if the Company won the election, he and other organizers would be let go.

<sup>44</sup> This description would aptly describe conditions after Woods and Les McClure met with employees on November 14. However, not a single employee was called to substantiate that, prior thereto, the attitude described by Cognetti, was held, heard or expressed by any individual or sector of the voting group. Indeed, although McClure mentioned the term on November 11 in connection with his personal fears, not a single incumbent employee was offered to confirm that rumors of a “hit list” were circulating at the time. Anthony Cousino, now a supervisor, but a rank-and-file employee during the campaign, testified that at his group meeting on November 14, he inquired as to the rumor he had heard concerning a “hit list.” However, he did not disclose the source of the rumor or when he first heard it. It is entirely possible that the rumor and the “feedback” described by Cognetti was given widespread attention after Cognetti’s November 13 meetings with Woods and McClure, and, particularly, after Woods and McClure met with employees on the morning of November 14. In any event, Cousino’s testimony does not corroborate Cognetti’s claim that rumors circulated concerning a hit list prior to his November 13 meetings with these suspected union organizers.

<sup>45</sup> Woods’ limited involvement has been discussed previously. McClure, on the other hand, along with Drew Koerick, attended the initial meeting with union representatives on September 10 and 17. With Koerick, he signed a card on September 10, but, at some point, he informed Matthews that he did not wish to reduce his role out of concern that it would aggravate an ongoing feud with his brother, David McClure, the warehouse supervisor. He did, however, support the Union throughout the campaign, and, in two instances, acted as a conduit in the solicitation of authorization cards.

<sup>46</sup> Parenthetically, it is noted that Cognetti did not profess to have had any foundation for taking this accusatory stance against someone whose help he needed. There is no evidence that a hit list was ever mentioned or given lip service by Woods, let alone concocted by him. Indeed, Woods had never professed any fear for his job—that is, until after his November 13 meeting with Cognetti. Moreover, while Les McClure admitted to mentioning the “hit list,” and to have expressed fear for his job, Cognetti disclaimed any intention of dealing with that issue in their private meeting.

[W]ithin the next twenty-four hours or by the next morning I had to have a meeting with the rest of the employees and advise them all to vote no.

He [Cognetti] wanted a thirty-five . . . to . . . nothing vote and if I didn't have this meeting that . . . my job would be done.

Cognetti allegedly enforced his remarks by stating that he could get rid of anyone he wished and that he would terminate McClure's wife, who worked for the Company, as well. Cognetti also told McClure not to attend the union meeting scheduled for the next day at the Clearview Restaurant, adding that "he'd know as soon as the meeting was over who was there," and that his job would be eliminated if he attended.<sup>47</sup> McClure informed Cognetti that he would do as he had been told by getting together with Woods and having the meeting as soon as possible.

The Respondent contends that the feud between brothers was the sole focus of the McClure meeting.<sup>48</sup> Cognetti insists that the Union was not even mentioned. Cognetti claimed that Les McClure was called on the carpet solely because, in the group meetings, he had learned from employees that Les' behavior toward his brother was "upsetting and interfering in our operation and this was brought up by many people in the meetings of the 11th and 12th." In fact, according to Cognetti, several employees brought up the fact that the feud was interfering with warehouse operations, with Les undermining Dave by resisting his directives and encouraging others to do so as well. This translated into a "nuisance for employees" affecting their "morale and attitude."<sup>49</sup>

Though concerned about his credibility, the "hit list," and rumors that union organizers, including Les McClure, would be discharged, Cognetti admittedly raised that possibility:

I let him know in no uncertain terms that he must immediately, if not sooner, begin to communicate and cooperate with his brother. And he must immediately stop undermining and countermanding his brother's management decisions. And if he did not, his job . . . definitely was in jeopardy his job as well as his brother's or both . . . would be in jeopardy.<sup>50</sup>

<sup>47</sup> Cognetti also allegedly stated that he would deny that their meeting ever took place, and were it necessary to do so, that he would be believed over McClure.

<sup>48</sup> Les McClure and his brother David, the warehouse supervisor did not get along. It was a feud of long standing. Les McClure was upset when his brother, who had less time with the Company, was promoted to warehouse foreman about 7 years earlier. Les McClure more recently admitted to complaining to coworkers concerning his brother's alleged mistreatment of subordinates as well as himself.

<sup>49</sup> Was this an admission on the part of Cognetti that he had taken a step to resolve at least one of the complaints raised by employees?

<sup>50</sup> McClure admits that the family problem was raised by Cognetti, and that Cognetti might have said that he had just heard about it in the last couple of days from a number of employees. He also acknowledged that Cognetti said that he was upset about the controversy because it was disrupting production, and that he would correct the problem if it required that he get rid of one of the two. At the same time, not single employee was called to verify that they had raised the issue during the group sessions, or that the matter had a negative impact on work in the warehouse, or that they, or anyone else had complained that this was the case. Since this meeting,

Cognetti, when asked by the Respondent's counsel as to whether there was reference to union activity, replied:

None whatsoever, this meeting had absolutely nothing to do with union activities. It was something that . . . normally would be held by the warehouse supervisor if he had not been a party to the problem.<sup>51</sup>

Cognetti also denied that there was any mention of Les McClure's wife or his wife's position. And he reiterated that he made no remarks concerning union meetings at this, or any other meeting with employees. Finally, Cognetti insists that he did not tell Les McClure to speak with the employees.

#### d. The November 14 employee meeting

McClure testified that on November 13, after his meeting with Cognetti, he met with Woods and they decided to hold the meeting that afternoon.<sup>52</sup> Woods, then departed ostensibly to seek permission from Epton McCrea, a supervisor. McClure testified that later that afternoon he was informed by Woods that the meeting would be held the next morning at 7 a.m. According to McClure, he observed Woods post a notice announcing the meeting by the time clock.<sup>53</sup>

On November 14, at the 7 a.m. start of the shift, about thirty employees failed to report to their work stations. Instead, as previously notified, they gathered in the meeting room. Woods first addressed the group, and according to Koerick, stated that he did not want to do what he was going to do and that it was not consistent with what he was feeling. He went on to report that Cognetti had called him into the office the day before and instructed him to assemble the employees, and to tell them that the Union is bad and that Cognetti is good and that it would not be a good idea to have the Union. Koerick also testified, along with Randy Sibley, Randy House, Timothy Alguire, and Danny Richards, that Woods relayed that Cognetti told him that if he did not

Cognetti admittedly had not canvassed the employees to ascertain whether the problem had eased. Dave McClure appeared as a witness, but afforded no testimony that he, his brother, or they together adversely influenced work. Nor does it appear that Cognetti held a similar meeting with Dave McClure.

<sup>51</sup> Steve Hayden, the Respondent's vice president for information, testified that early in the week of November 11, he informed Cognetti that an employee, Bernie Knowlton, had told him that he had heard from some unidentified source that Les McClure had made the following pronouncement:

[I]f the Union went into the warehouse, Les would see to it that the management people, including his brother, would be brought down.

Cognetti did not testify that he at any time confronted Les McClure with this accusation. It is difficult to imagine that Cognetti would have allowed this serious matter to pass—that is if he were aware of it. It is equally difficult to imagine that he would not have been aware of the allegation if it in fact had occurred.

<sup>52</sup> It will be recalled that Woods, on the heels of his meeting with Cognetti, went home, apparently, without permission. Uncontradicted testimony establishes that he later returned that afternoon.

<sup>53</sup> Woods drew a complete blank as to how the meeting was arranged. If there were any doubt as to McClure's testimony as to the fact of a posting, it is dispelled by Frenyea's testimony that he knew that a meeting had been scheduled for the next day, because he saw the posted announcement on the afternoon of November 13. Another witness for the Respondent, Anthony E. Cousino testified that he also learned of the meeting from a notice posted at the timeclock.

deliver this message, he would be terminated.<sup>54</sup> Koerick, with confirmation from Danny Richards, added that Woods stated that Cognetti advised that he was aware of the upcoming union meeting, and he would have someone attend to see if Woods attended, and if he did, Woods would be fired before he reached home. Finally, according to Koerick and Richards, Woods stated that he had been informed by Cognetti not to press charges against him because if he did, Cognetti would last longer, and Woods would lose.

Woods testified that he and McClure were among the first to speak, and that, to his knowledge no supervisors were present.<sup>55</sup> He states that he told the employees that "Kinney's was a nice place to work and Rich [Cognetti] was a nice guy to work for." On examination by the Respondent's counsel, Woods acknowledged that people were upset about what transpired at this meeting.

According to McClure, Woods spoke first, briefly stating that he had met with Cognetti the day before and was asked to persuade everybody to vote no. Then, McClure avers that he spoke, stating that he had met with Cognetti, who asked for a 35 to nothing vote and that everyone in the warehouse vote no.<sup>56</sup> According to McClure, neither he, nor Woods made any statement as to how they intended to vote. He stated, however, that he told them that "it wasn't going to be a thirty-five to nothing vote."<sup>57</sup> According to McClure, the meeting then broke into a discussion of the pros and cons of unionization.

#### *e. Concluding findings*

The Respondent, by way of brief, argues that Cognetti's version is more reliable than that of Les McClure and Otis Woods "in light of the background and tenor of the campaign and the efforts made by the Company to dispel rumors of discharge." Unfortunately, the "background and tenor of the campaign" favors the Respondent only if one were willing to accept the subjective, almost entirely uncorroborated testimony by Cognetti, major portions of which struck as contrived and improbable.

Cognetti obviously is an intelligent gentlemen having years of operational experience in this large drug chain. Moreover, as senior vice president for operations, he declared that personnel matters were a "major" part of his responsibility. Yet, none of the critical aspects of his testimony made sense. His stated reasons for meeting privately with these employees were pure pretext.

<sup>54</sup> Wendell Scott, another employee, was less certain, but testified that he "believed" that Woods mentioned at the meeting that Cognetti had threatened his job.

<sup>55</sup> McClure testified that the only possible supervisor present was George Erdman, whose status is in dispute on the basis of the Union's challenge to his ballot in the representation case. The challenge is overruled, *infra*.

<sup>56</sup> As I understand McClure's testimony, there was little discussion of what had transpired with Cognetti on November 13. In his case, he explained that a number of employees, on November 13 approached him to inquire as to what provoked Woods to leave the plant. He used those occasions to advise them of his own encounter, which he assumed tracked that of Woods.

<sup>57</sup> Koerick testified that after both Woods and McClure reported that Cognetti wanted a 35 to nothing vote, he separately stated that there would be at least one vote for the Union, thus, implying, it would be their own.

He claims to have intended merely to enlist Woods' support and to use his influence to the effort to secure a "no" vote. Yet, it is difficult to imagine that he could have expected any such plan to succeed without resort to coercion or bribery. Did he really expect that one whom he believed to be a union organizer would change horses merely on request? Even if this hurdle were passed, Cognetti's technique goes even further in causing one to pause. Thus, while he claims to have been interested in convincing Woods that he was a "man of his word" and worthy of the latter's trust, he alleges that he opened the session with baseless sarcasm and unsupportable accusation. His own testimony suggests an attitude more in line with the fear tactics attributed to him by Woods and Les McClure, than friendly persuasion. It is unacceptable that a man of Cognetti's background and responsibility would expect that cooperation might result from such a grating technique.

His excuse for seeking out Woods was no more persuasive. He avers that he appealed that Woods talk to employees in the following terms:

I asked him to support me with this hit list idea and to get out there and tell people you're not going to get fired. I'm not going to fire—you're not going to get fired, you know, whatever you need to say, you know, I said, "they just won't believe me."

This step was necessary, according to Cognetti, because of his perception that he was not trusted by the employees and they were concocting reasons why he should not be believed. Thus, he testified:

It was constant—one excuse manufactured after another one for me, one time [I] was the "new guy" so nobody should believe me.

The next time it was something else, you know, I'm a pharmacist, I'm not sympathetic with them. It was just constantly manufacturing one reason after another not to believe me.

I needed somebody credible or I didn't have a chance to turn it around. It blew up. I was sorry I tried it. I didn't know what else I could have done at that point.

However, Cognetti must have realized that only he could build his credibility.<sup>57</sup> Instead, if he is to be believed, one must accept that he would have entrusted this mission to a rank-and-file employee—and a supposed union protagonist at that. It is unacceptable that Cognetti would have proceeded from any premise that employees would find more believable, than his own direct words, assurances from one who bore all the earmarks of a stalking horse, totally lacking in authority to bind management.

Cognetti's interest in reversing any mistrust within the workforce is also betrayed by his admissions concerning his meeting with McClure. Thus, apart from his "off the wall" accusations that Woods had started the Union, had "manufactured" the "hit list" idea, and had derived "sympathy" as a result, Cognetti met with McClure immediately after the

<sup>57</sup> Indeed, the credulity of any such expression on his part would receive logical support from the Company's discharge history, a point Cognetti allegedly made in at least one of his conversations with Les McClure.

meeting with Woods. Prior thereto, McClure was the only employee that had declined to quietly accept Cognetti's assurances concerning union based discrimination. There is no evidence that Woods had ever expressed concern for his job. Only McClure had expressed that fear.<sup>58</sup> Yet, on November 13, a day when Cognetti was burdened by an assumed lack of credibility, he admittedly reversed himself, threatening McClure's job during their private meeting, a step that obviously would do more harm to his credibility than any third party could rectify.<sup>59</sup>

Beyond the foregoing, the remarks of Otis Woods and Les McClure at the November 14 meeting were totally inconsistent with Cognetti's testimony as to what had transpired with each on November 13. Not a single witness was called to contradict the testimony as the remarks they imputed to Cognetti on that occasion and other occasions. Cognetti swears these were lies, testimony that raises the question as to just why employees who were concerned for their jobs would fabricate a case against their Employer's top official.

These, of course, would have been egregious falsehoods. Their seriousness was underscored by testimony of Vice President Frenyea and Human Resources Manager Field. Both attest to the fact that the performance of Woods and Les McClure at the November 14 meeting could only have inflamed the "hit list" rumors that Field described as untrue and as having no place in the operation. He testified:

[T]he very nature of the new management concept that Rich [Cognetti] was trying to instill in the warehouse, that even the existence or implications of such a list were certainly counterproductive to the image and the program that we were trying to instill at the distribution center.

<sup>58</sup> Cognetti admitted that Les McClure twice raised the issue. The first, followed his October 25 speech. McClure, at the time, expressed fear that *if the Union won the election* he would lose his job. He reminded Cognetti that he was a good, faithful, loyal employee, with long service, as well as a stockholder in the Company. Cognetti claims that he assured McClure that he would not lose his job, reminding that McClure had been through other union campaigns and was still employed. Ron Field testified that, in that same time frame, Les McClure approached him, stating, "Regardless of how this turns out. . . . I know I'm going to be fired." Field replied that no one would be fired over this. Nevertheless, McClure again raised this concern before Cognetti and Field during his November 11 group meeting.

<sup>59</sup> Counsel for the Respondent does not share in my view as to the significance of this aspect of the McClure statement. In his posthearing brief, he argues:

[T]he General Counsel would have this tribunal believe that during the course of its efforts to dispel the rumor [concerning discharge of union organizers], the Company did an about face, shot itself in the foot, and actually threatened to discharge two of the Union organizers, thereby dooming its chances in the election.

The incongruity between this argument and Cognetti's version of what took place in McClure's meeting is simply left by the Respondent to "hang out there." Another interesting statement in that brief relates to Cognetti's denial that he threatened Woods. The Respondent in its brief states that, "This threat would have been inconsistent with the Company's prior course of conduct, and, therefore, makes little sense." Would the Respondent distinguish the threat to Les McClure on this ground?

Field testified that until the "hit list" rumor emerged that the Company was doing well in the campaign, but that this issue turned it around. Moreover, Field admitted that on November 14, he learned that McClure and Woods had alleged that Cognetti threatened them with discharge. He declared it shocking that these two individuals would tell such a lie. He admits, however, that after this disclosure, he sought out both to assure them that they would not be discharged.

Frenyea, as well, professed astonishment. He testified that he arrived at the warehouse that morning shortly after 7 a.m. because additional "group meetings" were scheduled to resume at 8 a.m. He claims that he ran in to Don Bush, who stated:

Boy, you guys are dumb. I can't believe that you were that stupid to do that. . . . I cannot believe that you people threatened to fire Les and Otis. . . . That was the dumbest thing you could have done . . . you had it in the bag. I can't believe you were that stupid.<sup>60</sup>

Frenyea claims to have reacted in surprise, denying that "we'd be that stupid to do something like that." Burns indicating that he did not know, but that "If it comes down to it, if we have to vote for the union in order to protect somebody's job, we'll do it." Frenyea claims that he was "flabbergasted" by the revelation.

Frenyea claims to have moved on to Mae Cryderman, who was crying. When asked about the problem, Cryderman told Frenyea that he had lied to her when (in reference to a question raised by Nancy Turnball in a group session) he said nothing was going to happen if the Union came. Cryderman then observed that it now appeared that Cognetti was "going to fire Les and Otis." According to Frenyea, she added that in consequence she no longer knew whether Frenyea was worthy of her trust. He then asked if that sounded like something that he would do, adding

Mae, I can't promise you, I can't threaten you, the only thing I can say to you is we had an organizational attempt before, the union did not get voted in at that time, and no one was fired. . . . If we didn't do it then, why would we do it now? It does not make sense. It's absurd. It would be the most damaging thing we could do. Why would we do something so stupid as that?

Frenyea claims that Cryderman then stated that if it came to the fact that "these people would be fired if the union did not come in," and she definitely was going to vote for the union to protect the jobs of coworkers.

Frenyea also testified that the threat passed on to him by Cryderman in his opinion was a lie, a serious one at that, involving a declaration that hit him like a "ton of bricks." Yet, Frenyea at no time inquired of employees as to what had happened at the meeting which concluded just before his conversations with Burns and Cryderman. He also does not appear to have mentioned either conversation or the alleged threat to Cognetti. This despite the fact that, on my questioning, Frenyea stated that "someone" had attributed the threat to Cognetti. Yet, he apparently did not mention what had

<sup>60</sup> Thus, Frenyea disclosed that from the perspective employee that it was the November 13 threats by Cognetti, and not earlier events that would turn the campaign to the Union's favor.

been attributed to Cognetti, when at 8 a.m. he joined Cognetti in meeting with Cousino, Hill, and Bowman. Not only was he disinterested in Cognetti's position, but he also did not chose to seek identify of the individual that planted the "lie" against the firm's chief executive. When questioned by me whether management took steps to ascertain the source, Frenyea replied:

To a degree we did, but it wasn't so important to find out who started it, it was trying to stop it.

Frenyea agreed that the remarks passed on to him may have been founded on misunderstanding. He also agreed that this could not be ascertained until the remark was clarified by whoever initiated the "rumor." The obvious first step in stopping the rumor was to find out who started it. It is unbelievable that he would draw a complete blank on this matter that had hit him like "a ton of bricks."

Cognetti also reacted passively. He testified that he arrived at the warehouse on November 14 while the meeting was in progress. He did not intervene, but testified that he later received a report that:

Les and Otis took over the meeting and . . . nobody else could get a word in edgewise. And they told [them] that . . . I told them to hold a meeting and if they wouldn't that they were history.

Thus, from Cognetti's perspective, Otis Woods and Les McClure not only had lied, but had crippled his effort to gain the trust of the warehouse employees, thus, exacerbating his alleged credibility problem. Yet, there was no effort to come to terms with Woods or McClure. Also peculiar, is the fact that he made no effort to disavow the allegations against him to the complement as a whole, either at an employee meeting or through literature. From my impression of Cognetti, he would not have shied away from confrontational stance concerning the remarks attributed to him, unless he knew them to be accurate.

Apart from these affronts, Woods and McClure published their allegations against Cognetti to the entire work force at an unauthorized meeting during working time. Cognetti insisted that he did not want Woods to conduct a meeting and, in this connection, he swore that: "I did not want employee meetings going on in our facility." To that end, Cognetti testified that he had instructed Warehouse Supervisor David McClure not to allow such meetings on the premises. He does not indicate that he ever reminded, discussed, or otherwise had taken action against his warehouse supervisor for this apparent disregard of a prior instruction.<sup>61</sup> He also took no action against Woods or Les McClure for their appropriation of company time to portray him falsely.

In sum, not only did Cognetti decline to follow up or seek explanation from Woods or McClure, or request that they correct the record by telling employees the truth, but they would be rewarded with assurances of job security. Thus, the only employee-wide effort to quell the fall out appeared in the

November 19 letter,<sup>62</sup> discussed *infra*. In passing it is noted that there is no evidence that Cognetti, or any other management official informed employees that Woods and Les McClure had lied about what transpired during the November 13 meetings.<sup>63</sup>

As for the basic issues of credibility, for obvious reasons, Les McClure and Otis Woods were believed over Cognetti as to what transpired at their separate meetings on November 13.<sup>64</sup> This was a desperate attempt to break the back of the campaign by giving the suspected ringleaders a choice between campaigning for a "no vote" or their jobs. I cannot accept that either employee—especially, Les McClure, whose 20 years of employment had been threatened under any version—would concoct an idea or run the hazards of participating in a scheme to conduct a meeting on work time (which no one from management ever seemed to question) in order to bear false witness against the highest operating official in the Company. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act when he instructed Otis Woods and Les McClure to campaign for a "no" vote,<sup>65</sup> and by threatening discharge if the refused. I further conclude that the Respondent violated Section 8(a)(1) of the Act by Cognetti's instruction that they not attend union meetings, and by his declaration that he would know if they did and they would be discharged in consequence.

<sup>62</sup>Curiously, this document specifically mentions Les McClure. Otis Woods, the most influential of the two, according to Cognetti, is not named therein.

<sup>63</sup>Cognetti testified that after learning that the meeting had backfired he sent management officials into the plant to inform that no one would be terminated. However, there is no persuasive corroborative evidence that this occurred. Although Field, in context of a prejudicially leading question, afforded a vague, if not oblique answer, that could be construed in that fashion, his testimony on cross-examination clearly and unambiguously establishes that he initiated the conversations with Woods and McClure, and that he "had not had any contact with Mr. Cognetti up to that point." Field did not testify that he initiated conversations with any other employees as part of any formal or informal damage control effort. The only other management official to testify that he discussed the issue with employees was Frenyea. He too, related that he learned of what had transpired from individual employees, and responded individually by providing assurances that there would be no discharges.

<sup>64</sup>Woods currently is a supervisor; he was a reluctant witness. He professed, incredulously, to a lack of recollection as to key aspects of his private meeting with Cognetti on November 13. One would think that a confrontation of such proportion with the chief executive officer would have been indelibly etched in memory of any employee. This is especially so when one considers the availability of G.C. Exh. 10, a document he prepared shortly after the incident, described by him as an accurate accounting of the confrontation. As an abstraction, it is unlikely that a rank-and-file employee would concoct a statement of this nature implicating a chief executive officer falsely in behavior so blatant as to be a corporate embarrassment. At the same time, the accuracy of this report is corroborated by a number of incumbent employees, who attested to Woods' emotional state on November 13, immediately after his confrontation with Cognetti, and to his role in the employee meeting of November 14. It was my decided opinion that Woods' professed difficulty with recollection was an outgrowth of the same fear concerning his job status that led him to participate in the November 14 meeting.

<sup>65</sup>See, e.g., *Salvation Army Residence*, 293 NLRB 944, 970-971 (1989); *McCarty Processors*, 292 NLRB 359, 367 (1989); *Delco-Remy Division*, 234 NLRB 995, 996 (1978)]

<sup>61</sup>At the time of the hearing, Cognetti did not even know if Dave McClure was aware that this meeting was going on during the shift. Thus, he was not sufficiently interested to check. Apparently, Cognetti was not interested in the possibility or reason why his warehouse supervisor had ignored this direct order.

At the same time, it is clear that the November 14 meeting was conducted pursuant to Cognetti's direction. However, there is no evidence that he authorized Woods or McClure to inform coworkers that the meeting "was being held pursuant to instructions . . . that they campaign against the Union or . . . be fired . . . ." Thus, they were not acting on behalf of the Respondent when they uttered these words. On their face, their respective messages had overtones of rebellion and dispelled any realistic assumption on the part of any employee that either was acting on direction of Cognetti. *Juniper Industries*, 311 NLRB 109 (1993); *Technodent Corp.*, 294 NLRB 924 (1989). It is concluded that neither was an agent whose conduct might be deemed binding on the Respondent.<sup>66</sup> However, for purposes of remedy, the scope of Cognetti's unfair labor practices are magnified by what occurred at the November 14 meeting, particularly, since the chain of communication was set in motion by Cognetti's unfair labor practices.

#### 5. The alleged promise of a promotion

The complaint alleges that the Respondent violated Section 8(a)(1) by Ron Field's promise to promote employees if the Union did not win the election. McClure testified in support of this allegation. He relates that on November 14, in the course of a discussion with Field concerning his encounter with Cognetti the previous day, he suggested that Cognetti apologize to himself and the other employees. Field conceded that the Company had done a few things the past few weeks that "weren't quite right," but that things would get better. Field stated that he would suggest that Cognetti apologize. Of immediate interest here is McClure's assertion that Field went on to state that "if the union did get voted out, he would promise me a salary position with the Company."<sup>67</sup> McClure expressed disinterest.<sup>68</sup>

Field admitted to separate conversations with Les McClure and Otis Woods on November 14, after hearing reports that they had stated that they were going to be fired. He sought them out to make it "perfectly clear" that this was "untrue."<sup>69</sup> He first met with McClure stating that there was no

<sup>66</sup> *Milgo Industrial*, 203 NLRB 1196, 1198 fn. 14 and 15 (1973), is distinguishable since there the alleged agent acted consistent with the employer's "generalized instructions. *Hall Industries*, 293 NLRB 85 (1989), cited by the Charging Party, at fn. 1, is actually consistent and supports the finding that neither Woods nor McClure said anything "that other employees would reasonably believe . . . allied [them] with management."

<sup>67</sup> McClure and Woods prepared and signed a joint statement that day that indicated as follows:

Ron Fields talked with both Les McClure & Otis Woods (1 to 1) said that their jobs would be protected even if the Union got voted out. He said he was talking for Rich Cognetti. [G.C. Exh. 12.]

The above statement signed by McClure on November 14 does not mention this promise. However, both signed, and there is no evidence that such a promise was made to Woods. The statement obviously was limited to remarks separately, but commonly addressed to both.

<sup>68</sup> Later, in December, McClure was offered a supervisory position which he declined.

<sup>69</sup> He admittedly had come to this conclusion without checking with Cognetti.

way he was going to be fired,<sup>70</sup> and "where did this come from."<sup>71</sup> Field denied that there was any mention of a possible promotion. I believed McClure over Field. The latter's testimony fits within a pattern of implausible testimony by Respondent's officials as to their own reactions during the aftermath of the November 14 meeting. At the same time, Les McClure, had everything to lose, and nothing tangible to gain by testifying against his superiors. Based on his credited testimony, I find that the Respondent violated Section 8(a)(1) by suggesting that he would be promoted if the Union were defeated in the impending election.

#### 6. The November 8 antiunion meeting

The complaint alleges that the Respondent, through Cognetti, created the impression of surveillance on various occasions, including November 8. A union meeting was held on November 7. According to Thomas McFerran, at an antiunion meeting conducted in the warehouse a few days later, Cognetti announced to employees that he knew that the aforementioned meeting sponsored by the Union was attended by 27 employees.<sup>72</sup> Cognetti denied that he ever made such a statement to an individual or at a meeting. In this instance he is credited. If in fact Cognetti had made such a remark, it would have astounded many of the 27 employees that attended that meeting. Yet, the General Counsel failed to exact corroborative testimony from any of the several witnesses who ostensibly signed the attendance sheet at that time, and who presumably, along with McFerran, attended the company meeting of November 8. In this light, although Cognetti was a generally unfavorable witness, in this instance it is more likely that McFerran was mistaken. The alleged impression of surveillance allegation is unsubstantiated by credible proof and shall be dismissed.

#### 7. The November 19 guarantees

The complaint alleges that the Respondent violated Section 8(a)(1) on November 19, when Cognetti, both orally and in writing, implied to employees that union supporters would be terminated "if the Union won the election."

Cognetti testified that after learning of the employee meeting on the morning of November 14, he instructed Charles Owens, vice president of distribution and pharmacy, Steve Hayden, vice president of management information, Ed Easten, vice president of purchasing, Wayne Frenyea, vice president of finance, and Ron Field to go to the warehouse and back Cognetti up by informing employees that he was

<sup>70</sup> Field did not seem to perceive of any paradox in his providing aid and comfort to this individual who, as far as he knew, had just broadcast a false accounting of statements made by Cognetti. Also noteworthy is the fact that Field testified to an earlier conversation with McClure in which the latter indicated that he would be fired no matter what happened at the election. Field assured him then that he would not be fired.

<sup>71</sup> When questioned as to this phrase by the General Counsel on cross-examination, Field denied having uttered it. The slip was major but not uncommon, for all of the Respondent's witnesses seemed to "circle the wagons" when asked about their interest in discovering "where did this come from." It was my impression that they knew just as did Les McClure and Otis Wood.

<sup>72</sup> The sign-in sheet pertaining to the November 7 union meeting contained 27 signatures. G.C. Exh. 8(a).

not going to terminate anyone. According to Cognetti, all reported back that the mission had been accomplished.<sup>73</sup>

Yet, the meeting of November 19 was described by Cognetti as another attempt to quell the hit-list problem. According to Koerick, Cognetti stated that he had heard that McClure was to be fired if the Union was voted in. He then read a memorandum to the assembled employees which stated as follows:

During the past week, I was advised that a number of our employees felt that they should vote for the Teamsters Union because it was feared that the Company would discharge Les McClure, and other employees who were the principal union organizers, if the union loses the election this Friday. I want to assure you that will not happen. Beyond that, I am prepared to give you a written guarantee to that effect.

Accordingly, Kinney Drugs, Inc. guarantees that, as long as *LES MCCLURE* and the other employees who were the principal union organizers perform their job in a reasonably satisfactory manner, the Company will continue their employment as warehouse employees of this Company and will not take any steps to cause a termination of the employment relationship. This guarantee may be enforced by a New York court having jurisdiction over the parties.

This guarantee applies only to the situation where the Teamsters Union loses the November 22, 1991 election and is not thereafter certified as the collective bargaining representative. Also, because the Company cannot guarantee lifetime employment, this guarantee will be limited to a three year duration, and will also not apply in the event the Company ceases warehousing operations in New York State.<sup>74</sup>

Copies were then given to Koerick for delivery to McClure, who was on vacation at the time, and to Union Representative Matthews.<sup>75</sup> Those attending were given a copy. In addition, a copy of the memo was posted by the Respondent on the bulletin board where it remained through the election.

Cognetti claims that he took this step "to convince them that the hit list was not true and that I did not intend to fire Les McClure if the company won the election."<sup>76</sup> He denied

that his taking this step had anything to do with the election to be held on November 22, only 3 days later. He claims that he delivered a speech on that occasion that he read "verbatim," and that he did not deviate from that. He also admits that read all or segments of the above memorandum.

Cognetti also insists that employees were told during that meeting that no one was going to be fired.<sup>77</sup> Although his testimony is susceptible to varying interpretations, I reject Cognetti's uncorroborated testimony that he ever, formally or informally, advised the voting group, individually or as a whole, that union organizers would not be discharged if the Union were designated.<sup>78</sup>

The November 19 memorandum was drafted as if he intended to keep the fear alive.

At the same time, it is considered unlikely, on this record, or as a generality, that employees would fear reprisals against organizers only "if the union were defeated." In fact, Cognetti, in his November 13 meetings with Woods and McClure and instructions to both had planted the seed for general understanding within the voting group that both would be terminated if they did not join the effort to defeat the Union. Cognetti knew that Otis Woods and Les McClure on November 14 repeated his directive to coworkers, thus, giving rise to a very real concern that they would be fired if they failed, and the Union were designated.

The November 19 document would have been taken by employees as the best evidence of Cognetti's intentions. Yet, it did not address the predictable concerns generated by his conduct of November 13, which he had not previously recanted, retracted, denied, or even addressed in any prior communication with the work force as a whole or individually. The limited assurance that union supporters would be spared if the Union were defeated, in this context, by negative implication, reenforced the likelihood, in the eyes of employees, that the Respondent would take retaliatory action if the Union were designated. Accordingly, the November 19 message was drafted in terms likely to perpetuate and give continuing vitality to the previously communicated threat that McClure and other "union supporters" were endangered by the possibility of a union victory. This attempt to capitalize upon and draw additional coercive gain from his unlawful conduct of November 13, was nothing short of a cynical act of manipulation and a clear violation of Section 8(a)(1).<sup>79</sup>

that his job would be secure. However, Fields did so in McClure's case as well. There is no evidence that Cognetti ever provided Woods any similar assurance. Is it possible that Cognetti wished to avoid further outrage by the supporters of Otis Woods at time when he was publishing a highly conditional guarantee?

<sup>77</sup> Not a single witness was called to confirm that an unqualified statement of this breadth was made during the meeting.

<sup>78</sup> This is consistent with his testimony that he had repeatedly promised that there would be no discharges, but that employees expressed disbelief, referring to the "hit list . . . and that if the union were defeated McClure and the other organizers would be fired."

<sup>79</sup> While I would not kill time seeking authority for this clearcut unfair labor practice, counsel for the Charging Party saw fit to aid the effort by reference to *Jeannie-O Foods*, 301 NLRB 305 (1991), and *Bay Metal Cabinets*, 302 NLRB 152 (1991). In neither instance was I extended the courtesy of a spot site. Because the fact pattern was highly unusual, out of curiosity, I elected to review these citations. After reviewing all 36 pages of *Jeannie-O Foods*, and the mere 32 pages of *Bay Metal Cabinets*, I was rewarded with nothing

<sup>73</sup> Previously, I have found that that this did not in fact occur. As indicated not one of the named individuals offered testimony that they were enlisted in any such effort. Two, Field and Frenyea, offered extensive testimony as to their own alleged personal involvement in the fallout, but did not suggest that they were acting at Cognetti's behest. Field specifically denied that he even had spoken to the latter. It is mentioned because, if Cognetti were worthy of belief, there would have been no need to reopen the issue on November 19.

<sup>74</sup> G.C. Exh. 9.

<sup>75</sup> Koerick testified that after the meeting, he approached Cognetti in the presence of a coworker, Carl Burns, and asked that he have his name included on the memo, but the request was denied, with reference to Koerick's reputation as a good worker.

<sup>76</sup> In his account of the events on November 13, Cognetti claims that he believed that Les McClure offered no threat as an organizer, since he would not have the same influence as Otis Woods. Yet, Woods went unmentioned in the above letter. Les McClure, for unexplained reasons, became the focus of attention less than a week later on November 19. Woods did testify that "one or two days" after the November 13 meeting with Cognetti, Ron Fields told him

### 8. Conduct attributed to Dave McClure

Several 8(a)(1) allegations are attributed to Dave McClure, the distribution center supervisor. McClure claims that after learning in September that a union campaign was in progress, Cognetti directed him not to be involved with the Union, stating "my role was . . . to run the warehouse on a daily basis and not to worry about the union issues. His own testimony, and that of several incumbent employees, however, indicates that McClure was unable to steer a steady course in this regard. In fact, he admits to three conversations with three different employees concerning the Union. He claims that in each instance the subject was initiated by the employee, yet, despite Cognetti's directive, it is clear that he at no time attempted to cut off these conversations.<sup>80</sup>

The complaint alleges that the Respondent violated Section 8(a)(1) when Dave McClure threatened that employees would be locked out and lose employment if the Union were designated. The allegation stems from a one-on-one conversation between McClure and Donald Bush. Danny Richards testified that he observed the conversation between Bush and McClure from a distance of about 15 to 20 feet. He could not be sure, but believed that McClure was alert to his presence. Richards claims to have overheard McClure tell Bush:

[I]f we went Union . . . they were going to hire Walsh Trucking to bring the freight directly to the store. . . . [I]t would be for two percent over cost and it would be cheaper than us shipping it out from the warehouse. And . . . as far as the warehouse goes, it would be history.<sup>81</sup>

McClure admitted to a conversation on request of Bush on November 13, after 1 pm. Bush stated that he had heard that "if the union was not voted in, that Les McClure and Otis woods would lose their job." McClure said that he just arrived and had heard nothing like this. Bush asked if there was a possibility that the warehouse might close. McClure claims that he replied, "Not that I know of." Bush asked if the warehouse would close in the event of a strike. McClure stated he did not know and could not give an answer, but

that would in the most remote sense resemble the matter in question here.

<sup>80</sup> The allegations are based on testimony of incumbent employees. The Respondent provides a number of reasons, all nonmeritorious, for discrediting them, including that fact that there often was no corroboration. This was taken by me as more likely a function of McClure's preference for addressing them alone, than as a signal that each separately manufactured evidence against their superior. If in this a sector of the case, there was a suspicious pattern, it would lie in McClure's repetitive testimony that union matters were always raised by employees, who were never questioned about their union sentiment, because it was always volunteered.

<sup>81</sup> Timothy Alguire testified that on November 13, he observed Dave McClure conversing with Bush. He could not hear what was said. However, immediately thereafter, Bush allegedly informed Alguire, "we may have a big problem," adding that McClure told him that "Kinney's would lock the door before a Union would be allowed to come in." Although this testimony is hearsay as to what was stated by McClure, it is primary evidence that Bush's report of what was said squares with what Richards claims he overheard and, in that limited regard, is corroborative and probative to the extent that it supports the probability of Richards' account.

that if it did occur, the stores would have to be serviced by an outside vendor. He denied that any threats were made to Bush. While I was not impressed with McClure, suspicion was aroused by his insistence that Alguire and Richards were not in the area, and that if they were, he would have observed them. This raises the question of how Richards would have learned of a version closely resembling that of McClure. I doubt that Bush would have provided a twisted version of his remarks. I credit Richards, an incumbent employee, who would have no reason to infuriate the highest ranking day-to-day, hour-by-hour representative of management in the distribution center by implicating him falsely in unlawful conduct.<sup>82</sup> The Respondent violated Section 8(a)(1) by Dave McClure's threats that if the Union were designated that trucking would be contracted out and the warehouse closed.

The complaint also alleges that Dave McClure coercively interrogated employees on various occasions in violation of Section 8(a)(1). Thus, Alguire testified to a conversation in McClure's office on November 8. He claims that after they discussed business procedures, as Alguire was leaving, McClure asked how he felt about the Union. Alguire asked if he should close the door, and McClure indicated that he do so. Alguire then responded by stating that he had no vendetta against Kinney's, Cognetti, or McClure, but that he was for the Union because of the need for job security. McClure opined that it was better to approach problems "one-on-one," rather than to have to deal through a third party.

McClure testified that Alguire routinely came into his office to secure cigarette stamps that were stored there for security reasons. He states that, on the occasion in question, after simply asking Alguire "how things are going," the latter launched an assault upon the Company's practice of paying half time for sick leave, volunteering that he was leaning toward the Union because of dissatisfaction with this arrangement. McClure avers that he simply stated that he did not think that the Union could correct this, but that if it did, Alguire might risk losing other benefits. He claims that union sentiment was volunteered and he denies asking how Alguire felt about it.

Here again Alguire was believed over McClure. In this regard, Alguire admits that he was pronoun, and he did not make a secret of his feeling in that regard. He adds that he did mention to coworkers that he was for the Union because of a concern for job security. While he denies having made any similar disclosure to any management representative prior to his November 8 conversation with McClure, he testi-

<sup>82</sup> Bush was called as a witness for the General Counsel, but afforded no testimony which tended to substantiate this allegation. His testimony concerning conversations with McClure was limited to a single incident in which he simply informed McClure that he was opposed to the Union. Bush was an incumbent employee, who though readily available to the Respondent, was not called by the defense either to corroborate McClure, or to refute the separate experiences attested to by Alguire and Richards. Bush professed to be an antiunion employee, whose performance at the hearing hardly suggested that he was particularly friendly toward the General Counsel. In this light, it is understandable that another direct witness to the alleged conversation was selected to substantiate this allegation. Had the Respondent called Bush, and had he offered testimony supportive of Dave McClure, it is not beyond possibility that my views in this regard might have been quite different.

fied that he would assume, however, that the Company would have known that he was for the Union.

The test articulated in *Rossmore House*, 269 NLRB 1176 (1984), and *Sunnyvale Medical Center*, 277 NLRB 1217 (1985), does not license employers to personalize an overall pattern of unlawful intimidation by intruding on privately held sentiment of individual employees. In such a context, the law allows employees to keep their views from the ears and eyes of management, without intrusion of supervision, particularly one of high rank, thus avoiding concern on their part that a truthful response could lead to recrimination. The scenario depicted by Alguire, considering the job security issues that would later emerge pursuant to the Respondent's unlawful threats, reflected an inherent coercive tendency, and substantiated interrogation proscribed by Section 8(a)(1). The Respondent violated the Act based on Dave McClure's conduct in this regard.

Another series of independent 8(a)(1) allegations are founded upon testimony of Carl Burns, a picker, who at the time was supervised by McClure. Burns testified that on November 11 he participated in a prolonged conversation with McClure in which he was questioned concerning his position on the Union. Burns avers that he replied by indicating that he had not made up his mind. McClure then allegedly went on to state that if the Union came in, employees could lose health insurance, sick time, vacation time, retirement, bonuses, and their jobs, including his own. McClure then probed Burns as to what the Union could do for employees. Burns pointed to improved job security and representation. McClure replied that if they struck, the warehouse would not even be slowed because nonunion personnel would be hired to fill the void. Burns also recalled that McClure mentioned that employees could be locked out, but he could not recall if it was in that conversation.<sup>83</sup> Burns conceded to a limited recollection of what was said, and could not recall the framework or overall context of the remarks he imputes to McClure. He stated that he recalled only what he thought what was important.

McClure testified that, in making his rounds, he asked Burns how things were going, only to find that the latter was "quite upset." Burns explained that he felt uncomfortable because "tensions are really high in the warehouse right now with the union issue." McClure did not agree, but because Burns was concerned about his benefits, he explained those presently in effect; he denied saying anything that would have suggested that those benefits could be lost. He denied stating that Kinney benefits were better than those of the Union. McClure insists that he simply outlined the Kinney benefits because Burns' basic concern was that if he would lose those benefits, what would the Union replace them with.<sup>84</sup> He also denied reference to a possible strike, or that employees might lose their jobs if the union were designated.

<sup>83</sup> McClure also denied any reference to a lockout. In this instance, it would be prejudicial to accept the shotgun testimony of Burns, for his confessed lack of recollection arouses critical doubt as to whether remarks attributed to McClure in this regard were in a context protected by Sec. 8(c). In this light, McClure is given benefit of the doubt, and I credit his denial that there was any mention of a lockout.

<sup>84</sup> McClure admits that Burns did not express a lack of knowledge concerning existing benefits, and hence, if McClure is to be believed, his gesture in this regard was purely officious.

Basically, McClure's account of the benefit discussion made less sense than that of Burns. On the issues of interrogation, and loss of benefits and jobs, I believed this incumbent employee, who lacked any apparent incentive to falsely implicate his superior in direct, unambiguous forms of unlawful conduct, even though his capacity for recollection in other areas was a bit frail.<sup>85</sup> On this basis, I find that the Respondent violated Section 8(a)(1) on the basis of Dave McClure's coercive interrogation of Burns, as well as his expression that designation of the Union would occasion a loss of benefits and a loss of jobs.

Danny Richards testified that on November 15, at about 10:30 a.m., McClure approached him, and inquired as to Richards' opinion on the Union.<sup>86</sup> The latter replied that he did not know too much about it, but that what happened to Les McClure and Otis Woods was unfair.<sup>87</sup> He added that he just hoped he had a job after all this ended, although he believed that the employees should be able to make their own choice without any pressure. McClure then stated that Richards would retain his job if he voted "no," but if he voted "yes" they all could lose their jobs.

McClure denied ever discussing the Union with Richards. Obviously, Dave McClure was not regarded as a trustworthy witness. Here again, I did not believe that the incident was manufactured by this incumbent employee. Based on Richards' credited account, I find that the Respondent violated Section 8(a)(1) by the questioning of Richards as to his union sentiment, and by his personal and general threat of job loss if the Union were selected.

Randy House, another of Dave McClure's subordinates, testified that as he was working on November 15, the latter approached, asking what he thought about the "union deal." House replied that things are "getting pretty nasty." McClure allegedly said, "if the Union went through . . . things would get a lot more nastier." McClure claims that, as in other cases, he simply approached House asking, "how things were going." House allegedly responded as if he did not wish to talk with McClure, so according to the latter, "I basically left him alone." House is credited. His testimony is consistent with a pattern of conduct attributed to the warehouse supervisor, by other, then employed members of his staff, who had no reason to endanger their relationship with the boss through false testimony. Based upon House's credited testimony, I find that the Respondent violated Section 8(a)(1) when Dave McClure questioned him concerning his

<sup>85</sup> Unlike Cognetti, who had been versed in the mechanics of collective bargaining as his writings demonstrate, there is no reason to assume that Dave McClure had been schooled similarly. This is especially so in light of his testimony that he had been instructed not to discuss the Union. At the same time, from my impression of him, it is entirely likely that McClure would have interpreted and passed on his understanding of such complex rhetoric in the same fashion as the rank and file employees that appeared as witnesses in this case.

<sup>86</sup> Richards also testified to conversations with McClure on several occasions after union meetings. In them, Richards would be asked which way the people were siding, for or against the Union.

<sup>87</sup> Richards' initial testimony reflects that this occurred on November 11. This was taken as in error, for, there is no evidence of any inappropriate conduct toward Les and Otis until November 13. Later, on cross-examination, a more logical, presumably accurate reference to this date was made, placing it on November 15.

attitude about the Union, and by declaring that unionization would prove detrimental.

*C. The Postelection Issues (Case 3-RC-9808)*

1. The objections

*a. By the Employer*

A single objection filed by the Employer remains for consideration. Thus, in Objection 1, it complains of misconduct in the form of representations, during the critical preelection period, by union agents that Les McClure, and other principal organizers would be fired if the Union lost the election.

The objection is unsubstantiated. There is no evidence that any union agent contrived or planted such a rumor in the plant. It is founded on expressions by rank-and-file employees, who were not shown to be agents of the petitioning union. Their remarks of support for Otis Woods and Les McClure and concern that union representation was needed to protect these long-term employees took place during and after the November 14 meeting held pursuant to Richard Cognetti's direction. The reaction within the work force to the threats made to Otis Wood and Les McClure the day before was a foreseeable and perfectly legitimate response to the unlawful conduct of the Respondent's president. The Employer's contention that the election should be invalidated on this basis is reminiscent of a time-honored legal cliché, namely, that of the unfortunate young man on trial for the murder of his parents, who pleads for "mercy" on the ground that he is an "orphan." Employer Objection 2 is overruled.

*b. By the Union*

The petitioning Union's Objections 2 (threats of discharge), 4 (coercive interrogation), 7 (remedied grievances), 8 (promotions), 9 (threatened discharge for not campaigning against the Union), 10 (creating the impression of surveillance), 11 (threatened closure), and 12 (threatened loss of benefits), are sustained to the extent summarized in parenthesis. In these particulars, all are coextensive with specific unfair labor practices found herein, all of which occurred during the critical preelection period. Moreover, all other 8(a)(1) violations found herein, having been uncovered during the investigation of the aforesaid timely objections, as a matter of Board policy, furnish independent grounds for setting the election aside. Accordingly, "catchall" Objection 13 is also sustained. For reasons heretofore stated, Objections 3 (threats during group meetings), 5 (threatened lockout), and 6 (promised better wages, benefits and working conditions), as particularized, do not correspond with conduct found unlawful herein and are overruled.

Based on the foregoing, it shall be recommended that in the event any final tally fails to disclose that a majority of the valid ballots have been cast for union representation, the election conducted in Case 3-RC-9808 shall be set aside.

2. The challenged ballots

*a. The alleged temporary employees*

The Board challenged the ballots of Diana Fairbanks, Paula Fleming, James McCrea, Andrew Netto, Carol Ormasen, and Sheila Wollman, because their names did not appear on the eligibility list. The Respondent contends that

they were ineligible as within the unit's express exclusion of "temporary employees." The petitioning Union contends that all are eligible since hired and employed during the eligibility period as "regular part-time employees."

There is no doubt that they were hired pursuant to increased labor demands that have continued to the instant hearing, and whose abatement has not been defined with any precision. Thus, in 1991, pursuant to a contract with I.B.M., the warehousing operation was being placed on a computerized system that would enable accommodation of eight additional stores without an increase in manpower. The new operation initially was scheduled to go on-line on September 16. In the interim, during the installation stages, there was an increased need for labor in the warehouse. David McClure testified that, during the spring, he informed Stan Layo, the vice president with responsibility for the warehouse that "we would need some temporary people to get us the manpower to move the freight and move the merchandise and all of the equipment in the interim. According to McClure, Layo obtained approval from headquarters. The project opened with the hiring of students Andrew Netto and Dennis Woods in the spring of 1991. Four additional students were hired that summer.<sup>88</sup> They would provide "extra hands" in locating and relocating product, hardware, fixtures, and equipment ancillary to the renovation effort.<sup>89</sup> It was felt that need their employment would end when they returned to school before the scheduled completion date in September. However, the I.B.M. project was delayed, and a new startup date was set for January 30, 1992. Thus, when the students left in August, the labor demands persisted, and it was decided to replace them "to get us through to January" by the hiring of Wollman, Fleming, Ormasen, Fairbanks, and McCrea, and by retention of one of the students, Netto.<sup>90</sup>

According to the Respondent, labor demands intensified by late October, with no apparent relief in sight. As indicated, Rita Smith, Vicki Bice, and Sally Ayen, former part-time employees, were upgraded to full time on October 25. (R. Exh. 6.) Cognetti explained that these employees were working full-time hours, if not more, and advancement to

<sup>88</sup> Shelby Rouse, Tom Langtry, Amy Jenkins, and Chad Fishel.

<sup>89</sup> Customarily, the Respondent hires summer help, but normally only two or three students are involved.

<sup>90</sup> Cognetti's predecessor, John Burgess approved the hiring of the additional summer help, while Cognetti himself approved the hiring of the challenged voters. Cognetti testified that he was reluctant to do so, but that he gave his okay based on the fact that they would be "temporary," and employed only until the January 30, 1992 completion date. He also claims that he directed that they be hired at the minimum wage, a departure from practice, and be given no raises or benefits. However, the Respondent included them in its campaign under conditions suggesting that there were no clearcut answers to their status. During the meetings with small groups of employees between November 11 and 14, most if not all of these employees were "invited." In fact, though the Respondent was pressed for time because of the unanticipated length of the meetings, a separate session was scheduled for Fleming, Ormasen, and Fairbanks. Cognetti explained that the employees were included because it was felt "we should listen to their concerns as we did to anyone else." Although the Respondent's counsel sought to establish that topics other than the "union campaign" were discussed, it is clear that the Union stirred management's interest in these matters, and to cure the lack of communication believed by the Respondent to have given impetus to the organization campaign.

full time was preferred over the hire of additional part-time employees. He explained that the demand for labor continued, as two new stores, one extraordinarily large, had been added,<sup>91</sup> while promised labor savings due to the I.B.M. project had not materialized.

Heavy demands on the work force continued right through to the hearing. Thus, in another sector of the case, Cognetti dramatically addressed this condition as follows:

[Y]ou have to realize that all through this project and right up to today we're working in some cases around the clock, even seven days a week situation, tremendous pressure, tremendous hours put in by these people, heroic efforts by . . . these people to make this things [sic] work.

I.B.M. still has not been able to complete the system. The record does not reflect that a new target date had been set.

The Respondent does not present a consistent picture of work demands existing at that time. Two challenged voters, Netto and Fleming were terminated on January 30, 1992. Steve Hayden, the Respondent's vice president for information systems, explained that these terminations were warranted because:

We had cleaned up pretty much, we weren't doing a lot of extra things at that point. The merchandise had been physically changed. The only thing remaining was the testing, and we really didn't need them anymore.

This of course, raises the question as to why the four remaining challenged voters were retained.<sup>92</sup> One becomes even more curious when it is considered that, at that time, all four were reclassified to "full-time, permanent positions." Cognetti explained their "retention" as follows:

[W]e got to that target date or that deadline [January 30, 1992], and I.B.M. . . . had still not completed the software. As a matter of fact, as we sit here today, the project is still . . . under development, and we still don't have the software components that we need.<sup>93</sup>

The next step—their conversion to permanent status—was explained by Cognetti as based on the following:

Like I say, the end was not in sight. We were . . . working some of these part time employees full time, overtime even, as well as some other part time people. So we were getting further and further in the hole here. We opened store thirty-four in the middle of the year [1991]. We purchased . . . number thirty-five, in the end of August [1991], and that was quite a high volume store, probably equivalent to two . . . of our average stores. So we, again, were getting further and further

behind in our service level to our stores was deteriorating rapidly.<sup>94</sup>

The Petitioner relies essentially on the fact that these employees, at times material, worked at least "four" hours<sup>95</sup> weekly and hence were not "call-in." This position misses the point. The evidence does not disclose and there is no contention that they are ineligible because casual employees. Nor is it helpful that their work and supervision conformed with that of permanent full-time employees.<sup>96</sup>

The Employer contends that the stipulated unit excludes temporary employees, it excluded them from the eligibility list on that basis, and, since internal personnel records demonstrate that they were regarded by the Employer as temporary, the challenges to their ballots must be sustained. In support, Cognetti verified internal, computerized personnel payroll records on Netto, Wollman, Fleming, Fairbanks, and Ormasen.<sup>97</sup> Among other things, these documents characterize each as a "temporary employee."<sup>98</sup> Cognetti was unaware, and there is no evidence that the documents in question were ever shown to the employees in question. He never informed any of the six challenged voters that their employment would be for a fixed term.

There is no evidence that anyone from management did so. The testimony of Ormasen, Fleming, Fairbanks, and

<sup>94</sup> Fleming testified, without contradiction, that, on January 30, 1992, she was informed by Dave McClure that she did not have the Kinney attitude and that her services were no longer needed. The stated ground would be more consistent with a termination for cause than a reduced need, and hence would be more in line with Cognetti's explanation than that offered by Hayden. Netto testified that he was laid off in November, after the election, and in May 1992, was rehired, but specifically informed by Dave McClure that his job would be temporary.

<sup>95</sup> This apparently was an inadvertent error, for the record shows that they worked 24 hours weekly or more.

<sup>96</sup> The Petitioner contends that "objective evidence" in the form of their participation in discount benefits establishes that that these employees were other than temporary. This factor has no persuasive force. *Pandick Press Midwest*, 251 NLRB 473, 474 (1980). The Petitioner attaches significance to the fact that the employee handbook confers this benefit upon "part-time" employees. (C.P. Exh. 2, p. 18.) However, that document is of no aid to the inquiry, for it fails to differentiate between temporary and regular part-time employees, and hence on its face suggests that if both categories exist, both would be eligible.

<sup>97</sup> In addition, Steve Hayden, the Respondent's vice president of information management systems, testified that he maintained a running chronology of developments affecting the warehouse automation project, outlining both estimated thresholds and those actually reached. R. Exh. 8. This document refers to the hiring and termination of "temporary help." For unknown reasons it omits reference to the January 1992 reclassification of "temporary" help to full time status, and the October 25 conversion of three regular part-time employees to full-time status. Both were driven by the increased and continuing stresses upon labor and man hours due to this ongoing project. The document which was prepared and revised periodically on a word processor does not have the traditional reliability of business records that are immutable in nature and integrated in a business system that makes alteration less convenient than a stroke of the pen or punch at the keyboard.

<sup>98</sup> R. Exh. 4. Cognetti, while alert that changes in the computer data could be made at any time, he was not in a position to testify as to when the pertinent entry was made, or specifically, by whom. He was merely able to verify that they were in the computer in late December 1991.

<sup>91</sup> According to Cognetti, the 34th store was opened in late May 1991, and the 35th in late August, and the 36th in December. This latter store is the equivalent of about three stores and the 34th is equal to two.

<sup>92</sup> In addition, Netto testified that following his November layoff, he returned to work in May 1992, but specifically was informed by Dave McClure that his job would be temporary.

<sup>93</sup> Cognetti testified that they received notification that this target date would not be met, but he could not recall when this occurred.

Wollman, together with that of Netto, commonly, and without contradiction denies that this was the case.<sup>99</sup> They were interviewed by either Kirk McCaffrey, the warehouse foreman, or McKenzie, and testify, without contradiction that during employment interviews, no information was provided suggesting that their jobs would be limited in duration by demands of the I.B.M. project or any other contingency. It is credited. Also believed was unrefuted testimony by Fairbanks and Wollman that McCaffrey, at the time of hire, offered affirmative assurances of indefinite employment.

By way of analysis, it is important to emphasize that, in this area, an employer's unilateral determination merely opens, but does not end the inquiry. Pursuant to established Board policy, secretly held, uncommunicated limitations do not affect an employee's right of self-determination under the Act.<sup>100</sup> The law is sufficiently sophisticated in these matters to require that "employment for a fixed term" be founded on mutuality of understanding, rather than covert reservation to which the employees are not privy. Cf. *American Chain Link Fence Co.*, 255 NLRB 692 (1981). Here, the status of these precise individuals, all of whom worked regular hours, performing duties identical to those of other than temporary coworkers, was never the subject of agreement or overt declaration.<sup>101</sup> At no time, prior to the election, did the Employer ever see fit to inform the disputed employees that their employment was anything short of indefinite. In these circumstances, it is fair to conclude that the challenged voters possessed a reasonable expectancy of continued employment into the indefinite future. Accordingly, on that basis, I overrule the challenges to the ballots of Diana Fairbanks, Paula Fleming, James McCrea, Andrew Netto,<sup>102</sup> and Jim McCrea.

#### b. George Erdman

The ballot of George Erdman was challenged by the Petitioning Union on grounds that he is a supervisor with the meaning of Section 2(11) of the Act.

At the times material to the election, Erdman was hourly rated, having, basically, the same benefits as the drivers. At the time, was referred to as the "transportation coordinator," and was not entitled as a "foreman" or "supervisor."<sup>103</sup> He

drove a truck, customarily 1 day per week,<sup>104</sup> and on other days, loaded and unloaded trucks. He was the principal in-house mechanic, and, with assistance of another driver, personally maintained and performed routine repairs on the Employer's vehicle. If beyond his capacity, Erdman would arrange for the work to be done by outside contractors. Erdman did have a desk in the garage which he utilizes to perform paperwork in connection with repairs and maintenance and where truck assignments are posted.<sup>105</sup>

The Petitioner produced a number of witnesses in support of the claim that Erdman is a supervisor. All had opinions as to the authority he held, but, in the critical areas, there was first hand knowledge. For example, Les McClure described Erdman as "the lead person out there in the garage," but added that that truckdrivers report to him and that he schedules outgoing freight, while assigning runs to the drivers. McClure admitted, however, that he, personally, had no contacts in the garage.

Another witness for the Petitioner, Mark Closs, in the fall of 1991, primarily worked in the warehouse, admitted that Erdman never identified himself as a supervisor to Closs and that he was unaware that Erdman had meted out any form of discipline. He allegedly had given Closs permission to leave early *on his own* where there were enough people on hand to cover the work load. Closs claims that when he worked in the warehouse, he reported to Erdman, rather than a warehouse foreman, and that Erdman would direct warehouse personnel in loading a truck if they were unaware of correct procedures. He testified that Erdman, if not available, would "probably" be replaced by Dave McClure. In the event of a breakdown or accident, Erdman would notify McClure and go to the scene. As to time off and vacation, Closs testified that his requests would be directed first to Edwards, and that Edwards had authority to "tell" him he could take off. He admitted, however, that he did not know that Edwards was not relaying a decision made at a higher level. The same was true of the basic schedule; Edwards would deliver it, but Closs had no firsthand knowledge that he conceived it. He testified that Erdman, if not available, would "probably" be replaced by Dave McClure. In the event of a truck breakdown or accident, Erdman would notify McClure and go to the scene.

Another truckdriver, Donald Matthews testified that Erdman was his supervisor in the fall of 1991. He avers that at the time Erdman was hourly paid, earning \$1 more than the drivers, but is presently salaried. Drivers run the same schedules every week. Erdman would write down the stores where stops were required in a particular driver's area, a task which would not appear to involve independent judgement. According to Matthews, on holidays when a run must be covered, the schedule would be posted by Erdman, but he could not avow that Erdman would act on his own without consulting any superior. Erdman would honor a request for a day off on his own, if no one else is to be off that day. He would insist that he alone be contacted if there is a

<sup>99</sup> James McCrea did not testify, but the record strongly implies and I infer that he was similarly situated to the other five challenged voters.

<sup>100</sup> *Houston Building Service*, 296 NLRB 808 fn. 2, 813-814 (1989).

<sup>101</sup> I am alert to Cognetti's speech of October 25, which mentioned that "temporary employees" had been hired to alleviate conditions caused by the I.B.M. project. ALJ Exh. 1(b). However, the speech does not identify the individuals affected. Although one might infer that the reference is to some or all the six challenged voters, the Respondent did not sponsor that document, more importantly, does not contend that this was the case. In this light, it would be hazardous to disenfranchise these employees on this basis.

<sup>102</sup> Netto was a student, but his expectancy at the time of the election was indistinct from the other challenged employees and he too was eligible. *Shepard's Uniform & Linen Supply Co.*, 274 NLRB 1423 (1985). By the same token, had the others been deemed temporary, in the circumstances, the challenge to his ballot too would be sustained on that ground.

<sup>103</sup> See the testimony of Mark Kloss and Lee Griffith, both witnesses for the Petitioner.

<sup>104</sup> The regular drivers run routes 4 days each week.

<sup>105</sup> It seems only natural that one having maintenance responsibilities with a fleet of trucks would be involved in paper work that would justify his access to a desk. I do not see this as in any sense a sign of elevated status and certainly not an indication of supervisory authority.

breakdown in route. He has the authority to order parts.<sup>106</sup> Matthews was unaware that Erdman ever had issued a written warning, and he did not testify that Erdman ministered any other form of disciplinary action.

Lee Griffith, also a truckdriver, testified that in at the time of the election he was supervised by Dave McClure. He described Erdman as a "truck driver coordinator" whose duties included loading and maintaining trucks. Griffith testified that his route has not changed in 2 or 3 years. Customarily, he only drives 3 days per week, while doing maintenance and loading the remaining 2 days. He assists Erdman in performing maintenance on the entire fleet. He states that, at the time of the election, when he needed time off, he asked McClure. When he replaced another driver for vacation purposes, the assignment probably was given by Erdman. Griffith testified that Edwards also orders the "equipment" needed for in-house maintenance.

Cognetti testified that the drivers while on the road remain responsible to Dave McClure, but while engaged in warehouse operations, they answer to McClure's subordinates, Foremen Efton McCrea or Richard Perrigo. Internally, McClure was carried in the salaried classification "warehouse supervisor," while McCrea and Perrigo were also salaried,<sup>107</sup> but classified as "warehouse foreman." Erdman was hourly rated and classified as a "truck driver." The remaining hourly classification in the bargaining unit is "warehouse clerk." Cognetti testified that Erdman could not exercise any authority over the truck drivers without going through McClure, McCrea, or Perrigo. He would only act as a conduit as to drivers whose odd hours limit their contacts with acknowledged supervision. Drivers basically work fixed routes which seldom change. According to Cognetti, any changes would be directed by McClure or Stan Layo, the vice president in charge of distribution and purchasing. They log their own hours, which they turn in to McClure.

Dave McClure identified Erdman as a "one of our truck drivers," who does a lot of mechanic work. McClure claims that he alone was the immediate supervisor of the drivers, and that he initiated discussion concerning route assignments, time off, and other supervisory issues, with his decisions relayed through Erdman to the drivers.

The witnesses offered by the Petitioner did not substantiate that Erdman possessed authority to hire, fire, discipline, promote, or effectively to recommend such action, or direct with employees with use of independent judgment.<sup>108</sup> Moreover, they did not persuade that they were in a position to know whether his communication to them concerning their job duties, granting time off, scheduling, or other secondary indicia of supervisory status were founded upon Erdman's inde-

pendent initiative or simply amounted to relayed directives originating at higher levels. Accordingly, it is concluded that there is no credible proof that Erdman, at times material, was a statutory supervisor, and the challenge to his ballot is overruled.

## THE REMEDY

### Conventional Redress

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

### Remedial Bargaining Order

#### 1. The appropriate unit

The complaint alleges, the answer admits and I find that the following employees constitute an appropriate unit for purposes of collective-bargaining under Section 9(a) of the Act:

All full-time and regular part-time truck drivers and warehouse employees including plant clerical employees employed by the Respondent at its 29 East Main Street and 520 East Main Street, Gouverneur, New York warehouse facilities, but excluding office clerical employees, professional employees, temporary employees, guards and supervisors as defined in the Act.

#### 2. The demand for recognition

By letter dated September 25, Michael Matthews, a non-employee organizer, wrote Richard A. Cognetti, the Respondent's president, claiming a majority, requesting recognition, and a immediate negotiations, while offering to prove its representative status through a third-party card check. (G.C. Exh. 6.)

Cognetti admittedly received the letter on September 26. However, he was not sure as to the employees sought, and therefore telephoned union headquarters that day, speaking to Fred Carter, the Union's president. Carter explained that the representational claim related to "the warehouse employees only." According to Cognetti, when he asked if office clerical employees were included, Carter stated that it did. In any event, the Union clarified its position in writing by letter of September 26, identifying the classifications sought as consisting of the following: "Warehousemen, Stock Clerk, Picker, Mail Person, Laborer, Warehouse Receiver, Return Clerk, Stocker and Truck Driver." (G.C. Exh. 7.)

The Respondent contends that Carter's letter "did not serve to clarify the unit description in a way that would make the unit an appropriate one." The claim is baldly stated and without explanation as to the nature of the problem. The only perceptible discrepancy would arise from Carter's alleged comment on the phone to Cognetti, concerning the placement of "office clericals." This would not conform precisely with the Union's letter of September 26, for this document would appear to claim plant clericals only. In any event there is no variance of substance between the classifications identified in the Union's September 26 letter and the unit to which the parties ultimately agreed and in which

<sup>106</sup>Cognetti disputed this claiming that assent by Dave McClure is required.

<sup>107</sup>Salaried employees are on a different vacation schedule and also participate in a salary continuation program in the event of disability.

<sup>108</sup>My conclusion in this respect is not altered by testimony of a single employee suggesting that Erdman was involved in a promotion. Thus, Mark Closs testified Erdman allegedly stated that since Closs had been working part-time for "over a year," he would "talk to" Dave McClure about reclassifying Closs to full-time. It is apparent that the decision would be made by McClure, and that the only apparent role in any evaluation was Erdman's report of the length of Closs employment, a purely objective fact.

the election was conducted. Moreover, the Respondent offers no authority tending to suggest that the appropriateness of the “scope” of the unit would be influenced materially by the placement of “office clericals.” The Union’s request of September 26 demanded recognition and claimed majority support in an appropriate unit, and there is no evidence that this produced any confusion at any subsequent time.

### 3. The union’s majority

The record includes 24 duly authenticated, perfectly valid, single-purpose authorization cards, signed by employees in the appropriate unit between September 10 and October 1. The cards include two executed by individuals within the group of seven whose eligibility was contested in Case 3–RC–9808. These documents on their face acknowledge a single objective; namely, designation of the Union as exclusive collective-bargaining representative.

Drew Koerick was the employee mentioned most prominently on this record as having engaged in card solicitation. In that process, he claims to have told coworkers to read the booklet and the card, adding that the cards would be used to get an election and if necessary to get a bargaining order in court in the event of threats.<sup>109</sup> He identified his own card, and authenticated numerous others. Those identified by him which were executed by eligible employees are listed immediately below with indication as to whether the ostensible signer appeared and testified that they completed, dated, and signed the document:

<i>Name</i>	<i>G.C. Exh.</i>	<i>Date</i>	<i>Confirmed by Signer</i>
Drew Koerick	100	9/10	yes
Les McClure	101	9/10	yes
D. P. Richards	102	9/17	yes
Darcy Love	103	9/28	
Tim Alguire	104	9/24	yes
Wendell Scott	105	9/18	yes
Sally Ayen	106	9/23	
Judy Fishel	107	9/26	
Carol Ormeson	108	9/24	yes <sup>110</sup>
Mae Cryderman	109	9/23	yes <sup>111</sup>
Rita Smith	110	9/23	

<sup>109</sup> On cross-examination, counsel for the Respondent elicited testimony that Koerick’s prehearing affidavit made no mention of a bargaining order.

<sup>110</sup> Ormasen testified that she received her card, stating that it was given to her by Les McClure, and returned to him upon execution; there was no mention of any involvement on the part of Koerick. The discrepancy, perhaps due to mistake, does not affect her own designation, or that of any other card signer, all of whom were apparently available to testify.

<sup>111</sup> Cryderman, on cross-examination, testified that she “believed” that the only purpose of the card was to get an NLRB election, a belief explained by her as based upon the fact that she was told: “if we sign them, that we could possibly get a union in.” She did not recall being told that the only purpose of the card would be to get an NLRB election.

<sup>112</sup> Woods, now a supervisor and the victim of extreme intimidation during the campaign, asserted that he was told by an individual whom he could not identify that a majority of the cards had already been signed and that they were for an election. He added that some one else who he could not identify told him that he was the seventh to sign.

<i>Name</i>	<i>G.C. Exh.</i>	<i>Date</i>	<i>Confirmed by Signer</i>
Andrew Netto	111	10/4	yes
Otis Woods	112	9/23	yes <sup>112</sup>
Carl Closs	113	9/23	yes
M. D. Closs	114	9/23	yes
D. Matthews	115	9/23	yes

The following cards were introduced solely upon testimony by the individual whose signature each bore:

<i>Name</i>	<i>G.C. Exh.</i>	<i>Date</i>
Michael Sudol	116	9/18
Leland Griffith	117	9/23
Carolee Hall	118	9/23
David Herhein	119	10/1
Donald Bush	120	9/23 <sup>113</sup>
Randy Sibley	121	9/18
Thomas McFerran	122	9/19
Carl Burns	123	9/23
Randy House	124	9/19

The Respondent, while citing precedent for the broad, general guidelines used in evaluating cards, does not isolate any single card which should be invalidated, or precedent that would support such a result in any particular case. Thus, no basis is given for rejection of any card produced in evidence. At the same time, I note that the fact that some employees might have been told that the card was solicited for the purpose of obtaining an election is a truism which did not invalidate or alter the unmistakable designation on the face of the card. Moreover, the fact that Bush and Woods assert that they signed because of a statement that a majority had already done so is also of no consequence, for such representations are within the range of “puffery” that solicitors are allowed under Board precedent. *Montgomery Ward & Co.*, 288 NLRB 126, 128–129 fn. 16 and 17 (1988). Moreover, statements from unidentified sources within the voting group furnish no basis for invalidating an otherwise legitimate designation.

The parties stipulate, that, apart from the seven challenged ballots, the unit consists of 33 employees. Having overruled all the challenges,<sup>114</sup> it remains clear that as of October 9, when the Respondent embarked upon its unlawful effort to thwart organization, the Union possessed 25 duly executed, valid, single-purpose authorization cards in a unit consisting of 40 employees. Moreover, it is concluded that, on this basis, the Union had, since September 24, represented a majority of the employees in the appropriate unit.

<sup>113</sup> Bush testified that he signed after being informed that a majority had done so. He adds that he would not have signed otherwise. The source of the comment is unidentified.

<sup>114</sup> Of the six employees challenged as temporary, only two signed cards that have been produced in this record. Thus, at least facially, the Petitioner-Charging Party would have been disadvantaged by this ruling.

#### 4. The obligation to bargain

The General Counsel appears to argue that a *Gissel* bargaining order is warranted because of the “Hallmark” violations, their quantity, and the fact that in cases where the unfair labor practices “were much less serious and pervasive” the Board granted such relief. Little is offered in the way of analysis by either proponent of the complaint.

In any event, the principal architect of the unlawful conduct in this case, was none other than Richard Cagnetti, the Respondent’s president and chief executive officer. He personally engaged in “direct, highly coercive, overt unfair labor practices” in the interim between the Union’s acquisition of a majority on September 25 and the election of November 27. See, e.g., *Ron Junkert*, 308 NLRB 1135 (1992); *Foster Electric*, 308 NLRB 1253 (1992); *Q-1 Motor Express*, 308 NLRB 1267 (1993). It was a dual strategy of “make up” and “break up.”

First, neglect of the warehouse employees was converted to penetrating attention on the part of Cagnetti, once the Union appeared, with the latter taking personal command and showing a sudden, now aggressive interest in their concerns, offering that, without a union, the problems of employees would be resolved. For any bewildered as to his intent, Cagnetti appealed expressly for additional time to “turn things around,” a promise given added credulity by changes—most being impecunious—but all symbolic of Cagnetti’s will to respond favorably to employee problems. The scenario is materially indistinct from that addressed in *Teledyne Dental Products Corp.*, 210 NLRB 435, 435–436 (1974):

Obviously such conduct must, of necessity, have a strong coercive effect on the employees’ freedom of choice, serving as it does to eliminate, by unlawful means and tactics, the very reason for the union’s existence. We can conceive of no more pernicious conduct than that which is calculated to undermine the Union and dissipate its majority while refusing to bargain. Neither is there any conduct which could constitute a greater impairment of employees’ basic Section 7 rights under our Act, especially since such conduct by its very nature has a long-lasting effect on the employees’ freedom of choice in selecting or rejecting a bargaining representative.

The futility of designing effective redress to combat a broad, nonspecific implied promise of benefits was addressed in *Astro Printing Services*, supra, 300 NLRB at 1029:

The [r]espondent’s failure to grant the benefits . . . did not minimize the impact of its unlawful. It is more likely that this failure would reenforce the lingering effects of the [r]espondent’s unlawful conduct by giving employees the impression that as long as the Union’s shadow remained . . . the employees would not be able to secure the benefits which the [r]espondent had stated they could get without the [u]nion.

Earlier, the same point was made in *Arrow Molded Plastics*, 243 NLRB 1211, 1220 (1979), as follows:

[E]mployees could not in the future, even with the aid of conventional Board remedies, register their choice uninfluenced by the lingering effects of . . . a form of

manipulation whereby employee expectation was aroused and tantalized by the undefined limits of their [e]mployer’s newly manifested responsiveness. The “greens” had been dangled, with the nature of the “carrot” which lay obscured beneath to be revealed only upon the [u]nion’s demise. It is to be anticipated that the uncertainty and temptation inspired by the [R]espondent’s entire course of conduct would lead their unlawfully stirred curiosity in any rerun election.

The second phase of the illegal strategy transcended the unspoken assurance that grievances would be resolved without need for a union. Mr. Justice Harlan, on behalf of the Supreme Court in *NLRB v. Exchange Parts Co.*, 375 NLRB 405, 409 (1964), referred to the “fist inside a velvet glove” as a metaphor to explain the dangers inherent in well-timed benefit grants. In this campaign, the blow was not always softened by “velvet.” The effort to break the Union was punctuated by many “Hallmark” violations, with specter of job loss signaled in a variety of forms, including subcontracting, discharge, and closure. Specifically, it is difficult to imagine that employees affected will soon forget that the president of the Company had asked that they not attend union meetings, and in the case of two employees, threatened discharge if they did.

Indeed, Otis Woods and Les McClure, each an employee with many years of service, were victimized by the most serious and egregious misconduct. Cagnetti’s attempt to subvert these long-term employees by giving them a choice between his will and their jobs entailed an arrogant display of corporate force. When both demonstrated the backbone to stand up to this intrigue, coworkers reacted with anger, sympathy, and concern. Cagnetti sought to turn this to advantage by a act of manipulation, only 3 days before the election. At that time, he deployed guarantees that Les McClure and other union organizers would be spared if the Union were defeated. There was no mention of what would occur to these individuals if the Union won. It was a clear attempt to harness employee concern for Les McClure, and perhaps, Woods, and other organizers by published guarantees that, on their face, were contingent upon rejection of the Union at the polls.

My view that a bargaining order is essential does not overlook the fact that this case was prosecuted on the strength of testimony by numerous employees, who, without hesitation, had the guts to come forth and disclose facts that knowingly would prove to be an embarrassment, if not devastating to the Company’s leadership. They did so while actively employed and in circumstances where self-interest is explainable only in terms of a desire to exercise Section 7 rights freely and without fear of coercive interference. One might ask, in light of this show of solidarity, just why a rerun election would not be fair. However, the impact of the employer’s misconduct must be examined—not just from the valor of those willing to come forth—but from the standpoint of the varying personalities, aspirations, and fears that one might presume to be found in the entire voting group. Not all would be willing to withstand extreme pressures in a tight labor market in the name of the uncertainties of collective bargaining. Otis Woods was a case in point. True, he is now a supervisor, but it was my distinct impression that his reticence about facts that he had committed to oath in the past,

punctuated by his claimed inability to remember the unforgettable was directly attributable to the manner in which he had been broken down by unlawful antics at the highest level. Absent some form of objective assurance, it is fair to assume that others in the voting group would have been blinded, temporarily, permanently, partially or fully, in consequence of this unlawful campaign were they again asked to address the issue of representation in a second election.<sup>115</sup>

Finally, there is the question of whether, in the face of this record, the Respondent can be trusted to avoid repetition of the unlawful conduct were a rerun conducted. I think not. Cognetti's testimony was patently false. Apart from voids in corroboration in major areas, internal inconsistency, and improbability, the allegations against him were substantiated by the testimony of number of incumbent employees, many with years of service. They describe an employer intent on taking high risk, desperate measures to influence employee choice unlawfully. It is incredulous to believe, accept, or assume that so many individuals were so zealous in their desire for the undefinable fruits of collective bargaining, that they would offend the oath, lie against the chief executive, and in the process, endanger their employment. Cognetti's untrustworthiness is also indicated by the trickery evident in his October 9, and subsequent, indications that he could not make changes, and his hands were tied, while almost simultaneously doing so, and then, if there were any doubt as to his intentions, formally appealing that employees reject the Union in order that he be provided a period in which to make corrections. The Respondent in this case has demonstrated a will to manipulate and violate the law as well as the oath under conditions that suggest not only that the effects of the unlawful conduct will linger, but enliven a very real probability that illegalities will reemerge in any followup campaign.

In the total circumstances, it is concluded that the execution of valid authorization cards is the only truly reliable measure of the desire of employees herein, and, on the total record, that choice is best protected by a bargaining order under aegis of the Supreme Court's decision in *Gissel*, supra. Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by, since September 25, 1991, failing to recognize and bargain with the Union, as exclusive majority collective-bargaining agent for employees in the appropriate unit. See *Trading Port*, 219 NLRB 298 (1975).

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by soliciting employee complaints under conditions implying that they would be adjusted favorably if the Union were defeated.

<sup>115</sup> The Respondent offered testimony suggesting that the unlawful conduct actually rallied employees to support of the Union. The testimony had no scientific basis, and involved subjective impressions of the management representatives, who, in effect were merely offering opinions that furthered management interests. The self-serving testimony of Cousino, Field, and Frenyea in this regard is an rejected as unpersuasive and a consideration inappropriate to assessment of the appropriateness of a bargaining order in this case.

4. The Respondent violated Section 8(a)(1) of the Act by promoting employees to full-time employment, by shutting off an offensive buzzer, and by restoring access to coffee during working time, all during the critical period prior to the election, and under conditions tending to interfere with the exercise of Section 7 rights.

5. The Respondent violated Section 8(a)(1) of the Act on November 11 and 12 when Richard Cognetti informed employees that, if the union were designated, they had more to lose because their pensions were vested.

6. The Respondent violated Section 8(a)(1) of the Act by on May 13 urging employees to campaign against the Union and to decline to attend union meetings in the future.

7. The Respondent violated Section 8(a)(1) of the Act on November 8 and November 11 when Dave McClure coercively interrogated employees concerning their union activity, and on the latter date, by also stating that employees could lose benefits they already had if the Union were designated.

8. The Respondent violated Section 8(a)(1) of the Act when Richard Cognetti, on November 13, created the impression that an employee's union activity was subject to surveillance.

9. The Respondent violated Section 8(a)(1) of the Act when Richard Cognetti, on November 13, threatened employees with discharge if they did not conduct a meeting for the purpose of influencing coworkers to reject the union.

10. The Respondent violated Section 8(a)(1) of the Act by on November 13, when Richard Cognetti instructed employees not attend union meetings, and by creating the impression that it would learn if they did so, in which event they would be discharged.

11. The Respondent violated Section 8(a)(1) of the Act by on November 13, when Dave McClure threatened that if the Union were designated, trucking operations would be contracted out, and the warehouse would be closed.

12. The Respondent violated Section 8(a)(1) when Ron Field on November 14 suggested to an employee that he would be promoted if the Union were defeated in the impending election.

13. The Respondent violated Section 8(a)(1) on November 15, when Dave McClure, questioned an employee as to his own union sentiment, and on other occasions questioning him as to that of coworkers, and also when Dave McClure, on November 15, threatened job loss if the Union were to come in.

14. The Respondent violated Section 8(a)(1) on November 15, when Dave McClure, questioned an employee as to his union sentiment, while going on to imply that unionization would operate to the detriment of employees.

15. The Respondent violated Section 8(a)(1) of the Act by on November 19, informing employees, orally and in writing, that employee organizers would receive job guarantees and spared from discharge only if the Union were voted out.

16. The following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(a) of the Act:

All full-time and regular part-time truck drivers and warehouse employees including plant clerical employees employed by the Respondent at its 29 East Main Street and 520 East Main Street, Gouverneur, New York warehouse facilities, but excluding office clerical

employees, professional employees, temporary employees, guards and supervisors as defined in the Act.

17. At all times, since September 24, 1991, the Union has been the majority representative of the above-described employees.

18. By virtue of the unfair labor practices described in paragraphs 3 through 15 above, the Respondent has engaged in conduct tending to undermine the Union's representative status and has precluded any likelihood that a fair election could be held in the future.

19. The Respondent violated Section 8(a)(5) and (1) of the Act, since September 25, 1991, by refusing to bargain in good faith with the Union as the exclusive collective bargaining representative of employees in the above-described bargaining unit.

20. The above unfair labor practices have an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>116</sup>

### ORDER

The Respondent, Kinney Drugs, Inc., Gouverneur, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employee complaints under conditions implying that they would be adjusted favorably if the Union were defeated.

(b) Granting benefits in the form of promotions to full-time employment, shutting off an offensive buzzer, and restoring access to coffee during working time, under conditions tending to interfere with the exercise of Section 7 rights.

(c) Coercively interrogating employees concerning their own, and the union sentiment of coworkers.

(d) Threatening that, if the Union were designated, an employees with vested pensions stood to lose, employees could lose benefits they already had, trucking operations would be contracted out, the warehouse would be closed, and/or employees would lose their jobs.

(e) Urging employees to campaign against the Union and to decline to attend union meetings in the future.

(f) Creating the impression that union activity is subject to surveillance.

(g) Threatening employees with discharge if they did not conduct a meeting for the purpose of influencing coworkers to reject the Union.

(h) Instructing employees not attend union meetings, and by creating the impression that it would learn if they did so, in which event they would be discharged.

(i) Suggesting to an employee that he would be promoted if the Union were rejected.

(j) Informing employees, orally and in writing, that employee organizers would receive job guarantees and spared from discharge only if the Union were voted out.

<sup>116</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(k) Refusing to bargain in good faith with the Union concerning the rates of pay, wages, hours and working conditions of employees in the following appropriate unit:

All full-time and regular part-time truck drivers and warehouse employees including plant clerical employees employed by the Respondent at its 29 East Main Street and 520 East Main Street, York warehouse facilities, but excluding office clerical employees, professional employees, temporary employees, guards and supervisors as defined in the Act.

(1) In any like or related manner interfering with, coercing, or restraining employees in the exercise of their rights guaranteed by section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union concerning the rates of pay, wages, hours and working conditions of employees in the above described appropriate bargaining unit.

(b) Post at its facilities in Gouverneur, New York, copies of the attached notice marked "Appendix."<sup>117</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60-consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notice is not altered, defaced, or covered by any other material.

(c) Notify the aforesaid Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 3-RC-9808 be severed and remanded to the Regional Director for Region 3 for the opening and counting of challenged ballots, issuance of a revised tally, and, in the event that a majority of the valid ballots have been cast for the Petitioning Union, issuance of a certification of representative. In the event that a majority have voted against representation, the election shall be set aside, and the aforesaid Regional Director shall take appropriate action consistent with the remedy provided herein.

<sup>117</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union  
To bargain collectively through representatives of their own choice  
To act together for other mutual aid or protection  
To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit employee complaints under conditions implying that they would be adjusted favorably if the Union were defeated.

WE WILL NOT grant benefits in the form of promotions to full-time employment, or by shutting off an offensive buzzer, or by restoring access to coffee during working time, under conditions likely to influence employees in the exercise of Section 7 rights.

WE WILL NOT coercively interrogate employees concerning their own, or the union sentiment of coworkers.

WE WILL NOT threaten that, if the Union were designated, a vested pension could be lost, or that employees could lose benefits they now enjoy, or that trucking operations would be contracted out, the warehouse closed, and/or employees would lose their jobs.

WE WILL NOT inform any employee that, if the union were designated, he or she stood to lose because his or her pension was vested.

WE WILL NOT urge employees to campaign against the Union and to decline to attend union meetings in the future.

WE WILL NOT create the impression that union activity is subject to surveillance.

WE WILL NOT threaten employees with discharge if they refuse to conduct a meeting for the purpose of influencing coworkers to reject the Union.

WE WILL NOT instruct employees not to attend union meetings, and create the impression that we would learn if they did so, in which event they would be discharged.

WE WILL NOT suggest to any employee that he will be promoted if the Union is defeated.

WE WILL NOT inform employees, orally or in writing, that union advocates would receive job guarantees and spared from discharge only if the Union were voted out.

WE WILL NOT refuse to bargain in good faith with the Union concerning the rates of pay, wages, hours, and working conditions of employees in the following appropriate unit:

All full-time and regular part-time truck drivers and warehouse employees including plant clerical employees employed by the Respondent at its 29 East Main Street and 520 East Main Street, Gouverneur, New York warehouse facilities, but excluding office clerical employees, professional employees, temporary employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfering with, coercing, or restraining employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union concerning the rates of pay, wages, hours, and working conditions of employees in the above described appropriate bargaining unit.

KINNEY DRUGS, INC.